



Digitized by the Internet Archive
in 2015

91

QUEEN'S BENCH
AND
PRACTICE COURT
REPORTS.

[OLD SERIES.]

PUBLISHED BY J. LUKIN ROBINSON, ESQ.

(From Manuscript Reports in Judges' Chambers.)

FROM MICHAELMAS TERM, 5 WILLIAM IV. TO HILARY TERM,
6 WILLIAM IV. INCLUSIVE.

1835-36

VOL. IV.

TORONTO:
HENRY ROWSELL,
KING STREET.

1851.

308745
—
1.
35

A

T A B L E

OF THE

NAMES OF CASES REPORTED IN THIS VOLUME.

A.	PAGE.	PAGE.
Allanson, Administrator of Allanson and Johnson.....	323	Doe Adkins v. Atkinson 140
B.		Doe Armstrong v. Roe 302
Baldwin et al. v. Slicer	131	Doe Bouter v. Fraser et al. 80
Bank of Montreal v. J. G. Bethune	193	Doe Brown v. Fraser..... 371
Bank of Montreal v. Bethune	303	Doe Crawford v. Coppledike..... 6
Bank of Montreal v. D. Bethune..	341	Doe Crawford v. Coppledike..... 328
Bank of Upper Canada v. Bethune et al.....	330	Doe Jackson v. Wilkes 142
Bank of Upper Canada v. D. Be- thune	165	Doe Jones v. Capreol 227
Bank of Upper Canada v. Boulton & Covert	158	Doe Lasher v. Edgar 339
Bank of Upper Canada v. Cooley..	17	Doe Mann v. Keith..... 86
Bank of Upper Canada v. Covert and Boulton.....	324	Doe McIntosh v. McDonell 195
Bank of Upper Canada v. Crawford	301	Doe Milburne v. Sibbald 330
Banker v. Griffin.....	112	Doe Miller v. Dixon 101
Barrett v. Rapelje, sheriff.....	175	Doe Neilson v. Gilchrist..... 276
Beach v. Odell.....	8	Doe Samson v. Parker 36
Beals v. Sheldon et al.	302	Doe Shuter & Wilkins v. McLean 1
Bigcraft v. Clarke	132	Doe West v. Howard et al. 135
Breakenridge v. King.....	180	Doe Wilcox v. Thorne 315
Breckenridge v. King.....	297	Ducat v. Green 110
Brown v. Bethune	331	Dutton v. Lake 15
Burgess v. Fanning	188	E.
C.		Eastwood & Skinner v. Helliwell.. 38
Comer v. Thompson	256	Elmore v. Colman 321
Cook v. Jarvis, sheriff	250	F.
Crooks v. Chisholm & Cameron ..	121	Fairclaim dem. Thompson v. Put- nam 336
D.		Ferris v. Dyer and McDonell 6
Davis v. Davis.....	322	Ferris v. Dyer and McDonell, one &c. 182
Dixon v. Paul et al.	327	Fisher et al. v. Beach..... 118
		Fowke v. Fothergill 185
		Fraser v. Flint 12
		Fraser et ux. v. Richardson 391

G.		R.	
	PAGE.		PAGE.
Glynn v. Dunlop.....	111	Randall q. t. v. Taggart.....	2
Gould v. White	124	Radenhurst v. McLean and Mc-	
Grant v. Executors of McIntosh ..	184	Pherson	281
H.		Redden v. McNab	136
Hall v. Ferguson & Duffy.....	392	Rex v. Higgins	83
Hamilton v. Walters	24	Rex v. Inspector of Licenses of the	
Hamilton v. Wilson	16	Home District.....	9
Heather et al. v. Wallace	131	Rex v. Jones & Skinner.....	18
Hooker et al. v. McMillan.....	14	Rex v. Justices of Bathurst.....	340
Hull v. Alway	375	Richards v. Boulton	95
I.		Ridout, one &c. v. Brown.....	74
In re Bustard v. Schofield	11	Rowand v. Tyler	257
In re Peter Paul Lecroix	339	S.	
L.		Samson v. Yager.....	3
Lemarand v. Whipple	12	Shaw v. Turton	100
Loucks v. Farrard	5	Smith v. Judson	134
Lyman, assignee of Sheriff of Gore,		Smith v. Smith	10
v. Cotter	15	Soper v. Brown and Riorden.....	103
Lyman, assignee of Sheriff of Gore,		Spafford v. Buchanan.....	325
v. Lovejoy and Babcock.....	15	Spafford v. Buchanan and Malloch	326
M.		Staats v. Reynolds	5
Mahoney v. Zwick, executor	99	T.	
Meighan v. Reynolds.....	19	Teal v. Clarkson	372
Mills v. Monger	383	Thompson v. Sewel	16
Monk v. Casselman	336	V.	
Monroe v. King, one &c.	189	Van Egmond et al. v. Jones	119
Morvey v. Maynard	323	W.	
Myers v. Howard et al.....	113	Waddel v. McCabe.....	191
Mc.		Walker et al. v. McDonald	12
McBride et al. v. Parnell	152	Washburn, one &c. v. Walsh	322
McKenzie et al. v. McBean	137	White et al. v. King, one &c.	189
McKinnon v. Burrows	71	Wilcox v. Burnside	288
McMartin, one &c. v. Spafford....	332	Wilkes v. Flint, Woodruff and Cle-	
McMillan et al. v. McLean	5	ment	19
P.		Wood v. Sherwood.....	128
Parent v. McMahon	120	Woodruff v. Glassford.....	155
Penniman v. Wince	335	Wragg v. Jarvis, sheriff.....	317
Perkins v. Connolly	2		
Powers & Scott v. Ruttan, sheriff..	58		

UPPER CANADA REPORTS,

OLD SERIES.

(Commencing from the end of Mr. Draper's Volume of Printed Reports.)

IN THE KING'S BENCH.

CASES DETERMINED IN MICHAELMAS TERM, 5 WILL. IV.

(Continued.)

Present,—THE HON. CHIEF JUSTICE ROBINSON,

“ MR. JUSTICE SHERWOOD,

“ MR. JUSTICE MACAULAY.

DOE EX DEM. SHUTER & WILKINS V. McLEAN.

Where A. gave an absolute conveyance of land to B., to secure a sum of money lent by him to A., and B. gave a bond for its re-conveyance, on the payment of the money lent, at a certain day, on ejectment brought by B., after a lapse of eight years—the court ordered that proceedings should be stayed, on the payment of principal, interest and costs, and refused to allow the plaintiff to include a simple contract debt, incurred on the security of the bond, because there was no writing respecting it, and the statute 7 Geo. II. ch. 20, under which the proceedings were stayed, did not extend to it.

Lessors of plaintiffs took from defendant's father an absolute conveyance of one hundred acres of land in the township of Murray, to secure a debt of 50*l.*, and gave a bond to him to reconvey if that sum were paid by a certain time. This was about eight years ago. McLean died in possession, and defendant is his heir.

Gamble moved to stay proceedings, on paying the debt, interest and costs incurred.

Draper, for lessors of plaintiffs, shewed cause, stating that defendant's father contracted a further small debt of about 14*l.* since the bond had been given, which plaintiffs let him have, relying on their deed as security.

ROBINSON, C. J.—I think this rule must be made absolute, and that we cannot notice the allegation of the small

debt, or allow it to form a charge upon the land, because there is no writing respecting it, and the power given by the statute does not extend to it.

SHERWOOD and MACAULAY, Js., concurred.

Rule absolute.

RANDALL QUI TAM V. TAGGART.

Where the plaintiff, after notice of trial given, in an action of debt, had leave to amend his declaration in one of the counts, and countermanded his notice; and, not having served the amended declaration, nor any new demand of plea, signed interlocutory judgment, and afterwards entered final judgment and issued execution—the proceedings were set aside for irregularity.

Debt on statute for usury. Defendant pleaded, and received notice of trial. A few days before the assizes, the plaintiff discovered the want of a formal conclusion to one of the counts of his declaration, and obtained a judge's order to amend. He served no amended declaration, nor did he again demand a plea, but signed judgment by default, and in August entered final judgment and took out execution.

Counsel for defendant, now moved to set aside the judgment and all subsequent proceedings, for irregularity.

Per Cur.—The rule must be made absolute; for certainly if the plaintiff felt it unnecessary to serve his amended declaration, he should of course have considered the plea defendant had filed as still existing, and should have gone to trial instead of countermanding his notice and signing judgment.

Rule absolute.

PERKINS V. CONNOLLY.

It is not necessary, in an affidavit made for the purpose of issuing a *capias ad satisfaciendum* by a plaintiff who has two christian names, to state the second, where his identity sufficiently appears by the affidavit describing him as the above plaintiff.

Spragge obtained a rule nisi to set aside the writ of *ca. sa.* issued in this cause, and to discharge the defendant from custody, and to set aside the bond he had entered into with sureties for obtaining the limits, on the ground of irregularity—the only objection being, that in the affidavit made for the purpose of suing out the *ca. sa.* the plaintiff's

second christian name was not written in full, but an initial letter only inserted. Upon cause shewn by *Draper*, the court determined that the objection did not come within the authority of any adjudged case, or within the terms of any rule of this court; both the cases and the rule being confined expressly to affidavits to hold to bail; and as Perkins was plainly identified by being described in the affidavit as "plaintiff in the above suit," so that there could be no doubt as to the person, they refused to set aside the proceedings, and discharged the rule.

SAMSON V. YAGER.

Where a note, originally joint, was altered to joint and several, without the consent of one of the makers, who was afterwards sued alone upon the note by an indorser: *Held*, that the plaintiff could not recover on the note, on account of the alteration—nor on the money counts, as there was no privity between the maker and him.

Assumpsit by plaintiff as indorser of a promissory note against defendant as maker. Upon the trial, before the Chief Justice, at the last assizes at Kingston, it appeared that the defendant and one Wells had made the promissory note on which this action was brought, and whereby they promised to pay, ninety days after date, 100*l.* to one Zwick or order. Zwick indorsed it to the plaintiff, and the plaintiff having also indorsed the note merely to give it credit, it was sent to the bank at Kingston for discount, and was returned to their agent in the country with the remark that the note must be made "joint and several," or it could not be discounted. It was drawn as a joint note only. Wells being informed of this, procured a stranger to insert the necessary words, "jointly and severally;" and the note being sent again to Kingston, was discounted by the bank. Wells received the money, and in a few days absconded. When the note fell due, it was not paid by the makers; and the plaintiff, as indorser, took it up, and brought this action against Yager, one of the makers, to recover the money. It appeared in evidence that the alteration of the note was made without Yager's knowledge, and indeed against his consent—that is, that he had refused to allow it, as was admitted by Wells when he got a third person to make the

alteration. It was not proved that Yager received any part of the money upon the note being discounted : it was paid to Wells. Upon the trial, the Chief Justice held, that the plaintiff could not recover upon the note, after it had been thus altered in a material point without the consent of the person who was now charged with it ; and he held further, that a verdict could not be sustained on the common counts, since it was necessary for the plaintiff to claim through the note, which was all that connected him with the transaction, and was the only medium through which the plaintiff could shew a liability. It was urged that Wells having absconded, the plaintiff was by our statute permitted to proceed against Yager alone, even admitting that they were only liable jointly, and not severally ; but this was not considered an answer to the objection, and the plaintiff was nonsuited—leave being reserved to him to move to enter a verdict in his favour for the note and interest, if the court above should think he could recover upon the evidence given. A rule for this purpose was accordingly obtained by *Samson* in this term ; but upon cause shewn,

THE COURT were of opinion that the nonsuit was proper ; that the fraudulent alteration of the note destroyed it as a medium of evidence ; that the bank could not have sustained an action against Yager, under such circumstances, since they had lent him no money and knew nothing of him except as his name appeared on the note ; and that if they could not maintain an action against Yager, it was clear this plaintiff could not, since he could acquire no right of action against Yager by paying for him a note which he was himself no longer liable to pay ; and as as between this plaintiff and defendant there was no privity except through the medium of the note, the common counts could not therefore be resorted to for evading the difficulty.

2 Car. & P. 401, and 3 Esp. C. 155, were cited ; and also Chitty on Bills, 100.

Rule discharged.

McMILLAN ET AL. V. McLEAN.

Setting aside award.

The court will not set aside an award, upon affidavits setting forth a party's just claim to the allowance of large sums of money, upon grounds which the arbitrators had rejected.

In this case, upon a reference to arbitration by rule at Nisi Prius, an award was made in favour of McLean for 120*l.*, which the Solicitor-General now moved on his behalf to set aside, upon affidavits setting forth his just claim to the allowance of considerable sums of money, upon grounds which the arbitrators had rejected : but as it appeared upon the face of the affidavits that the arbitrators had proceeded regularly—that both parties had been heard—that the particular claims spoken of had been discussed and awarded upon, without any ground being laid for inferring miscalculation or mistake, or for imputing partiality, except that the statements now advanced seemed, when unexplained, at variance with the conclusion which the arbitrators had come to :

THE COURT said it was not a case in which they would be warranted in interfering, and refused the rule.

LOUCKS V. FARRARD.

Where the rule to return the writ of *fi. fa.* had been taken out and served, in June 1833, the court refused to grant an attachment, on the ground of delay.

Washburn moved for an attachment against the sheriff of the Eastern District, for not returning the writ of *fi. fa.* in this cause. The rule to return the writ had been taken out and served so long ago as June 1833 ; and

THE COURT, on the ground of this delay, refused an attachment, saying that the plaintiff might be supposed to have waived the necessity of complying with the rule by having forborne so long to enforce it. If the plaintiff has not received satisfaction of his debt, and requires to have the execution returned, he must take out a new rule.

STAATS V. REYNOLDS.

Where an interlocutory judgment was set aside by judge's order, but, notwithstanding the order, the plaintiff proceeded and assessed damages ; the court set the proceedings aside.

In the summer of 1833, before the assizes, an order had

been made by Mr. Justice Macaulay, upon the return of a summons, setting aside, as irregular, an interlocutory judgment signed in this cause. Nevertheless, at the last assizes, the plaintiff, giving an ordinary notice, assessed damages; and it was moved in this term to set aside the assessment of damages, on two grounds—first, because of the order setting aside the interlocutory judgment, in defiance of which the plaintiff had proceeded; and secondly, because at any rate, as no step had been taken of more than four terms, the plaintiff was bound to have given a term's notice of assessing damages, if he could properly have proceeded on the judgment.

Per Cur.—Upon both grounds, the proceeding is clearly irregular, and the rule must be made absolute.

Rule absolute.

FERRIS V. DYER & McDONELL.

Verdict set aside—there being several special pleas upon which no issue was raised for want of rejoinders, and there having been no rejoinder served.

This case had been carried to trial at the last assizes for Niagara. The record was imperfect, there being several special pleas upon which no issue was raised, for want of rejoinders, and there had been no demand of rejoinder served. Nevertheless, the plaintiff entered the case for trial, and, notwithstanding the objections of the defendant on the ground of the incompleteness of the record, took a verdict upon the issue or issues, which were concluded to the country. *Sullivan*, for the defendant, now moved to set aside the verdict, on the ground of irregularity; and cause being shewn in the first instance,

THE COURT made the rule absolute.

DOE EX DEM. CRAWFORD V. COPPLEDIKE.

Where the plaintiff, having given notice of trial, did not enter his record with the Clerk of Assize in time, but the defendant notwithstanding agreed to go to trial if he were ready, and after having detained the plaintiff's witnesses more than a week, at last determined not to go to trial; he was refused the costs of the day.

In this ejectment, judgment had been signed against the casual ejector, and a writ of possession issued; but upon

an affidavit of merits, the court set aside the judgment, and allowed the defendant to plead. The cause was carried down to trial at the last assizes for the Home District; but from an accident, the record which had been passed with the Clerk of the Crown, was not entered with the Clerk of Assize, as it ought to have been, on the first day of the assizes. The plaintiff, nevertheless, being desirous of trying the cause, requested of the defendant to consent to the cause being entered on the second day, and was told that the defendant would consent if he found all his witnesses attended, so that he could go to trial without disadvantage. Upon subsequent enquiries during the assizes, the plaintiff was told by the defendant's attorney that he could not yet determine, as his witnesses had not come; and at length, in the second week of the court (the plaintiff having in the mean time kept his witnesses in attendance), the defendant's attorney decided that his client could not be prepared, and would therefore not consent to the cause being entered. The defendant, upon the ordinary affidavit, obtained in term the usual rule for the costs of the day, on account of the plaintiff's not having gone to trial pursuant to notice; and afterwards *Small*, for the plaintiff, obtained a rule to shew cause why that rule should not be discharged upon the grounds above stated; and upon cause shewn for defendant,

ROBINSON, C. J., said it would be harsh and unreasonable to make the plaintiff pay costs as the penalty of an omission in not going to trial, when it was his desire that the cause should be tried, and it was the defendant's refusal only that prevented it. There was the slip certainly of not entering the cause in time. If the plaintiff had not accidentally omitted that, he could have forced the defendant to trial—unless indeed the latter, being unprepared, could have succeeded in putting off the trial, in which case he must then have paid the plaintiff costs. The slip being made, the defendant takes advantage of it; and after some delay and hesitation, the costs of which it would be most unfair to throw upon the plaintiff, he declares himself not ready; and in consequence of his refusal, the cause is not

tried; and he then turns round upon the plaintiff, and claims costs of him for not doing what he (the plaintiff) was willing to do, and which, if he had done, must have proved injurious to the defendant. This would in effect be making the plaintiff pay costs, not because the defendant had sustained any injury, but because he (the plaintiff) omitted to take a step which would have enabled him to inflict injury upon the defendant, by forcing him to trial against his will and unprepared.

SHERWOOD and MACAULAY, Js., concurred.

Rule absolute.

BEACH V. ODELL.

Where the execution of a commission to examine witnesses in the United States was proved by the affidavit of the commissioner named therein, and the return thereof made under his hand (without his seal): *Held*, that under the provincial statute 2 Geo. IV. ch. 1, the execution was sufficiently authenticated.

This was an action of assumpsit, in which the plaintiff, in support of his case, produced a commission and interrogatories, executed in the United States. The commission was received by the court close under the hand and seal of the commissioner, being sealed and subscribed by him, and proved by Mr. Campbell, who stated upon oath that the parcel produced had been delivered to him personally by Mr. Taylor, one of the commissioners, executed by him, and returned close under his hand and seal. Upon opening the commission, a return was found enclosed, subscribed by the commissioner; and an affidavit of the execution thereof was annexed, sworn by him before Mr. Hodgkiss, who subscribed the jurat as a judge of the Common Pleas and chief magistrate of Lewiston, the place of execution. His handwriting and official character were proved by Mr. Miller, who was present at the execution of the commission, and saw Mr. Hodgkiss subscribe the jurat. It was objected at the trial, at the last Niagara Assizes, that the execution of the commission should be shewn by the affidavit of another than the commissioner himself, who was incompetent so to prove his own execution thereof; and that consequently, wanting the proof prescribed by the statute, it could

not be read ; also that the return of the commissioners should be under his seal as well as hand. These objections were overruled, but leave was given to move against the verdict for plaintiff. *Boulton*, for the defendant, obtained a rule this term, to shew cause why the verdict rendered should not be set aside, and a nonsuit entered upon the objections above noted ; but, upon looking at the statute, the Court held, that the execution of the commission was sufficiently shewn.

MACAULAY, J., intimated his impression that it was sufficiently manifested, according to the provision of the act, by the affidavit annexed ; and if not, that the extraneous proof seemed abundant upon the rules of practice governing such proceedings before, and independent of, the statute.

Per Cur.—Rule discharged.

REX. V. INSPECTOR OF LICENSES OF THE HOME DISTRICT.

Semble, that the Corporation of the city of Toronto has a right to suppress all billiard tables within its jurisdiction.

An application was made early in term for a mandamus to the Inspector of Licenses, to compel him to grant a license to one Denham, for keeping a billiard table within the city of Toronto. Upon the affidavits filed, the court granted a rule ; and upon the return of the rule, the question appeared to be this : By the provincial statute 50 Geo. III. ch. 6, no person can keep a billiard table for hire, &c., without taking out a yearly license, and paying for it 40*l.* ; upon paying which sum, and making a written requisition, the applicant is entitled, according to that statute, to his license. By the act incorporating the city of Toronto, 4 Will. IV. ch. 23, sec. 22, the Mayor and Common Council, among the powers granted to them, are authorized “to make such laws as they may think proper, to regulate or suppress (*i. e.*, for regulating or suppressing) all billiard tables, and to regulate all theatres kept for profit,” &c.

It was admitted by the Attorney-General, who moved for the mandamus, that a law or regulation of the Mayor and Council had been made, and was in force (if valid),

suppressing all billiard tables within the city, and declaring that none should be kept there; but it was objected, that they had not the power to do more than *regulate* billiard tables, or to suppress any one after it had been licensed, according as it might appear proper, for breach of their regulations; that they could not prohibit the setting up of any billiard table, and thus virtually repeal the statute of 50 Geo. III. so far as it would otherwise apply to the city of Toronto.

The court intimated their opinion that the Corporation had not exceeded their power, but did not give judgment upon the question, which indeed was not argued, the parties seeming ready to acquiesce in the view taken by the court, without desiring to contend further. It was stated on the behalf of the Inspector, that he had not refused to give the license, but had pointed out to the applicant that there was a regulation of the Corporation prohibiting a billiard table being used within the city, and he must understand that the license could only issue subject to such regulations as the Corporation had legally imposed. The applicant refused to take the license accompanied with any qualification, and took the course of applying for a *mandamus*.

SMITH V. SMITH.

When plaintiff had omitted to endorse the writ on which defendant was arrested before delivering it to be executed, but did so before bail had been given, and within an hour or two after the arrest, the court held the rule of Trinity Term 3 & 4 Will. IV. sufficiently complied with.

The court granted in this term a rule to shew cause why the arrest of the defendant on a writ of *capias ad respondendum*, should not be set aside for irregularity, on the ground that there was not indorsed on the writ or warrant to the bailiff any account of the sum demanded, and the costs as required by rule of court Trinity Term, 3 & 4 Will. IV.

Washburn shewed cause, and filed an affidavit stating that before bail was put in, and within an hour or two of the arrest, the plaintiff, discovering the omission, had annexed a minute of the debt claimed, and of the costs, to

the writ; and as it thus appeared that the defendant had the information intended by the rule of court, though not precisely according to the letter of the rule, the court refused to set aside the arrest.

Rule discharged.

IN RE COMPLAINT OF BUSTARD V. IRA SCHOFIELD, ESQ.

To support a motion for leave to file a criminal information against a justice of the peace, the affidavits should not be entitled as in a suit pending. Notice must be given of complainant's intention to apply. The motion should be made without unnecessary delay, and sufficiently early in term to admit of notice of it being given.

Sullivan moved, this term, on behalf of Bustard, for leave to file a criminal information against Schofield, for acts of oppression, stated to have been committed by him as a justice of the peace for the district of London. The affidavits disclosed a strong *prima facie* case, but the acts complained of were alleged to have occurred in February and March last, and upon consideration of the case,

THE COURT held themselves precluded from ordering a criminal information, for the following reasons:—1st, The affidavits on which the motion was founded, are entitled “in a cause of Bustard v. Schofield,” no such cause being depending, which in a case of this kind is held to be a decisive objection to their being received. 2nd, No notice had been given to the magistrate of an intention to apply for the information, which notice is indispensable. 3rd, The motion comes too late, after two terms (Easter and Trinity), have been suffered to pass, and after a Court of Oyer and Terminer has been held in the district. 4th, That besides this delay, the motion is made too late in this term to admit of the magistrate having notice of it, and shewing cause—a point on which the practice is strict. And the court remarked further, that if there were not these preliminary objections, the affidavits were in several respects unsatisfactory, in not disclosing particulars sufficiently to enable the court to judge of the acts complained of, and in not annexing the copies of writings referred to, which were stated to have been served on the complainant, and which, for all that appeared, it was in his power to produce.

Per Cur.—Rule refused.

WALKER ET AL. V. McDONALD.

Nonjoinder of a plaintiff in assumpsit, is a ground of nonsuit.

This was an action of assumpsit, for goods sold and delivered in 1831. The plaintiffs' witness, upon cross-examination, stated that John Forsyth, who is now living, was then one of the members of the firm, but had since retired; and the defendant, insisting that the misjoinder of his name was fatal on the general issue, moved for a nonsuit. The Chief Justice, before whom the cause was tried at the last assizes for Cornwall, allowed a verdict to be taken for the plaintiff, with liberty to the defendant to move for a nonsuit on the above objection. A rule nisi was granted in this term; and no cause being shewn, and the Court thinking the defendant strictly entitled to the benefit of his objection, made the rule for setting aside the verdict and entering a non-suit, absolute.

LEMARAND V. WHIPPLE.

The court will not try matters of fact on affidavits. Where therefore the plaintiff moved upon an affidavit of a material fact which was distinctly denied by the defendant, the court discharged the rule.

Murney moved to stay proceedings in this action, upon the ground that they were carried on contrary to good faith, and filed an affidavit setting forth that one Bates Cook having become the assignee of the judgment which had been entered up for Whipple the defendant, had entered into a compromise with him, and obtained terms of accommodation, and that Cook was now enforcing the judgment contrary to his undertaking. On cause shewn, this statement was distinctly denied on affidavit, and the Court discharged the rule.

FRASER V. FLINT.

Where a steamboat was mortgaged, and in possession of the mortgagees, who navigated her for their own benefit, to secure their advances, and she was tortiously taken possession of by the captain, who received the profits arising from her, for his own use: *Held*, that the mortgagor was not liable for goods furnished for the vessel, while she was in the tortious possession of the captain.

This was an action of assumpsit, brought by the plaintiff, a grocer, against the defendant, as one of the owners of the

steamboat "Niagara," for groceries furnished for the use of the boat in 1831. The plaintiff at the trial gave evidence (not very particular or satisfactory) of the delivery of the goods by his clerks, at Kingston, in 1831, to the steward on board of the boat, to the amount of 28*l.*; and to establish the liability of the defendant, he proved that he was one of a number of persons who subscribed for shares in the boat when she was built, and who were therefore originally joint owners of her. The boat was built before the year 1828, and in that year she was assigned to certain persons as mortgagees, to be navigated and used under their direction and for their benefit, until they should be fully satisfied for a large debt due to them on account of advances they had made to pay for the engine of the boat and for repairs. It was proved, further, that in 1829 or 1830, one Mosier, who had formerly sailed her as master, got possession of the boat by artifice or force, and maintained exclusive possession of her, receiving the proceeds for his own use, until the boat was ultimately taken to the United States, and lost to the owners; so that at the time these goods were furnished, neither the original owners, of whom the defendant was one, nor the assignees, had any actual control over the boat, or derived any advantage from her. The Chief Justice, who tried the cause at the last assizes at Brockville, held that the plaintiff had no right to recover against the defendant under these circumstances; that, putting out of view the assignment to the mortgagees, it would be a question whether the owner of the vessel, tortiously dispossessed, could be held liable to pay for necessities furnished to the boat, while he received no benefit from her earnings, and had no actual control over her; but that here there was the further obstacle, that the assignees were owners for the time, and entitled to the freight; and if under the circumstances of a tortious dispossession, the owner must nevertheless pay for supplies furnished, the claim would be against the assignees, and not against the original stockholders. Upon this ground the plaintiff was non-suited; and having obtained a rule in this term to shew cause why the nonsuit should not be set aside, and cause being

shewn, the Court concurred in the view taken of the case at the trial, and discharged the rule.

See *Twentyman v. Hart*, 1 Starkie, U. P. C. 292; *Fraser v. Marsh*, 13 East's Ppts. 238; 8 T. R. 10; *Jackson v. Vernon*, 1 H. Bl. 114.

Rule discharged.

HOOKER ET AL. V. McMILLAN.

Where a judgment was assigned to the defendant, for the joint benefit of the plaintiff and himself, and he received the whole amount of it: *Held*, that the plaintiff could recover his share, as money had and received.

Assumpsit for money had and received. This action was founded on the following facts:—Ward et al. had obtained a judgment against McDougal and others, proprietors of the "Niagara" steamboat, for a considerable sum of money; which judgment had been assigned to McMillan, the defendant: but the latter had signed a declaration in writing, by which he acknowledged that he held the assignment for the joint benefit of himself and the plaintiffs. It was proved that the defendant afterwards received from McDougal and others, through the sheriff of the district of Niagara, 845*l.* 16*s.* 4*d.*, one-half of which the plaintiffs claimed, together with interest from the time it came to defendant's hands. It was objected on the trial, that upon the evidence it was shewn that the plaintiffs and the defendant in this case held a joint partnership interest in the judgment, such as could only be ascertained and separated by a proceeding in equity; and upon leave being reserved to the defendant, he this term moved for a nonsuit, a verdict having been rendered at the time for the sum of 422*l.* 18*s.* 2*d.*, half of the sum paid to the defendant, and obtained a rule to shew cause, which was afterwards discharged.

THE COURT being of opinion that the verdict was proper—the facts shewing nothing like a partnership, but merely a joint interest in a sum of money, such as would be held by the joint payees of a promissory note, or the joint owners of any chattel; in which cases an action at law clearly lies by one against the others, where the money has wholly passed into the hands of either, or where the chattel has been converted by selling or destroying it—

Discharged the rule.

LYMAN, ASSIGNEE OF SHERIFF OF GORE, v. COTTER.

LYMAN, ASSIGNEE, &C., v. LOVEJOY & BABCOCK.

It is irregular to sign a judgment of non. pros., without filing the original papers in the judgment office.

In these cases, judgment of non. pros. had been signed, which *Washburn* moved to set aside as irregular, there being no proceedings whatever to be found in the office of the Clerk of the Crown and Pleas, at Toronto, in either of the cases except the entry of the judgment of non. pros.—no previous proceedings to shew that such actions were in fact pending. And in the second case, there was the further irregularity, that the judgment of non. pros. was signed as in an action of trespass on the case; whereas the only action pending in court between these parties—as appeared by the papers remaining in the deputy's office in the country—was an action for debt on bond. No cause was shewn, and the Court made the rule for setting aside the judgment of non. pros. in each case, absolute.

DUTTON V. LAKE.

It is no defence to an action on a promissory note, that it was given on a consideration that did not prove so beneficial as it was represented.

Assumpsit upon a promissory note made by defendant and payable to plaintiff. At the trial, it appeared that the note was given upon the following consideration:—The plaintiff had occupied certain portions of the land heretofore possessed by the Indians upon the Grand River, with the assent of the Indians, and upon some contract or undertaking with them; and one of these small portions of land had been assigned by him to Lake, the defendant, in consideration of which the note was given. The Government, through the agency of the Commissioner of Crown Lands, lately made sale of this land for the benefit of the Indians; and being willing to pay attention to the possessory right derived under the Indians, they allowed Lake a preference in purchasing, in consequence of his having acquired acquired Dutton's right. It was objected at the trial, at the last assizes for the district of Gore, that there was shewn not to be a legal consideration to support the note, as Dutton

had in reality no right to the land, and could not therefore make a valid assignment of it. A verdict having been rendered for the plaintiff, *Foster* this term moved for a new trial; but the Court said that as it was apparent Lake had derived an advantage, though not precisely such, or in such a form as he had in contemplation when he gave the note, and as his object in the transaction was in effect answered, the verdict was sustained by the evidence, and refused a rule for a new trial.

HAMILTON V. WILSON.

An award was set aside on account of unfair conduct in the arbitrators, in their manner of hearing the evidence.

The parties submitted to arbitration by bond, and an award was made, which Wilson, last term, moved to set aside, on affidavit setting forth unfair practice on the part of the arbitrators, in refusing to hear witnesses brought forward on the part of Wilson, and deciding the case without allowing time to produce the evidence, and various other grounds of alleged improper conduct. On the return of the rule no cause was shewn, and the affidavits being unanswered, the Court made the rule absolute.

THOMPSON V. SEWELL.

Where a new trial was granted on payment of costs by the plaintiff, who served three appointments for the taxation on the defendant, and the costs were at last taxed without disbursements, and the plaintiff tendered the amount, which the defendant refused to receive without the disbursements, which the plaintiff would not pay, but proceeded again to trial, and obtained a verdict: *the court* refused to set it aside.

In Michaelmas Term, 1833, the court made a rule absolute, setting aside the verdict rendered in this cause on payment of costs, and the plaintiff had repeatedly applied to defendant's attorney to obtain a copy of his bill for the purpose of discharging it, and had served him with three several notices of appointments to tax costs. On the day of the last appointment, the costs were taxed by the Master at 6*l.* 10*s.*, exclusive of disbursements. This amount was afterwards tendered to defendant's attorney, who, however, refused to accept it, saying that he must also have the

disbursements. Plaintiff having given notice, proceeded to trial at the last assizes for Niagara, and obtained a verdict, which *Spragge* now moved to set aside, upon the ground that the costs of the former trial had not been paid ; but on cause shewn, and the above facts being disclosed on affidavit, the court discharged the rule.—*Nichols v. Bozon*, 12 E. R. 185.

Per Cur.—The plaintiff obtained a new trial on payment of costs ; and it is true, therefore, that he was bound to pay the costs before he could regularly proceed to trial again. But the affidavits filed upon shewing cause, state so strongly that the plaintiff did all that he could do towards fulfilling the condition, that it would be unreasonable to charge him with irregularity. He served notice of an appointment to tax costs more than once, and in good time. The defendant failed to attend to it ; his disbursements were not known to the plaintiff, who, notwithstanding his appointments and notices, has never yet been able to learn what costs the defendant claims. He could not therefore have paid the costs, and the affidavits are strong to shew that the defendant alone is in fault, if his costs are still unpaid. He must therefore be content with his ordinary remedy to recover them.

Rule discharged.

BANK OF UPPER CANADA V. COOLEY.

Notice of non-payment to indorser held insufficient, upon the conversation (given below) between the indorsee's attorney and the indorser.

This was an action of assumpsit brought by plaintiffs as indorsees of a promissory note, against the defendant as indorser, the maker having absconded. Notice of non-payment by the maker was not proved, but to obviate the objection on that account, evidence was given by the plaintiffs' attorney, that in a conversation which he had with the defendant after the maker had absconded, and after the note was due, he admitted his liability so far that he desired time, and promised to pay, denying, however, that he had received notice until long after it ought to have

been given to him. The jury having found for the defendant, the *Solicitor-General* obtained a rule nisi to set aside the verdict, and for a new trial. *Draper* shewed cause.

ROBINSON, C. J.—It is very certain that upon the evidence given, the jury might have found a verdict against the defendant, although it is very doubtful whether he was aware of his legal rights when he had the conversation relied upon. The case, however, was fairly left to the jury. They were told to find for the plaintiffs if they felt satisfied that the defendant made the promise in direct terms, as stated. They have found for the defendant; and considering that the maker of the note has absconded; that the indorser appears to have had no notice; that the conversation relied on passed at the office of the attorney for the plaintiffs; and that there is reason to infer from the evidence that the plaintiffs' attorney did not rely upon the conversation spoken of as conclusive, but put off the trial from the former assizes, in order to obtain the testimony of a witness as to the delivery of the notice; and considering that the jury, upon a proper charge, have found for the defendant; I think we should not set their verdict aside. The case of *Whitaker v. Morris*, 1 Esp. N. P. C. 58, shews that it was properly left to the jury to say whether the proof of notice was dispensed with by an absolute promise to pay. Without doubting in the least the statement made by the plaintiffs' attorney, I think it would be improper in such a case to disturb the verdict.

SHERWOOD and MACAULAY, Js., concurred.

Rule discharged.

REX V. JONES AND SKINNER.

A prisoner in custody for grand larceny, may be admitted to bail.

Boulton (James) moved the court to discharge the defendants, who were in custody in Niagara, upon a charge of grand larceny. The informations and examination returned by the committing magistrate disclosed very slender grounds for suspicion; but the court, nevertheless, would not discharge the parties, but made an order for their being admitted to bail in a moderate sum.

MEIGHAN V. REYNOLDS.

The demand on a debtor on the limits for a statement of his effects, if in writing, must be signed by the plaintiff or his attorney, and the rule nisi for his commitment personally served.

The court, upon affidavits filed, had granted a rule on defendant (a prisoner in execution), to shew cause why he should not be taken from the limits and committed to close custody, for failing to give a statement on oath of all his effects, when duly required of him. On cause shewn, it appeared that the demand served upon him was not subscribed by any person, and that the rule nisi for his commitment had not been personally served on the debtor, but had been given to his attorney. The court on these grounds discharged the rule, but told the plaintiff he might take proper steps and apply again in chambers.

During this Term, the following gentlemen were called to the bar and sworn in :

STAFFORD FREDERICK KIRKPATRICK, JOHN P. CAREY,
Esquires.

JNO. B. ROBINSON, C. J.

J. B. MACAULAY, J.

KING'S BENCH.

HILARY TERM, 5 WILLIAM IV.

WILKES V. FLINT, WOODRUFF AND CLEMENT.

The owners of a vessel mortgaged, and in possession of and navigated by the mortgagees, are not liable for the loss of goods shipped on such vessel; and if they were liable, although the form of action were case, yet, as their liability would be founded on contract, and not custom, the acquittal of one defendant would discharge the rest.

This was an action on the case against the defendants as owners of a steamboat called the "Niagara," to recover the value of two chests of tea, shipped on board the "Niagara" at Prescott, to be carried to Hamilton, and which it was alleged were never received. Judgment by default had been signed against Flint—the other defendants pleaded the general issue—and at the last assizes for the Home

District, damages were assessed against Flint for the value of the tea. On the part of Flint, no defence was made at the trial, in order to mitigation of damages—his attorney relying, as it afterwards appeared, upon setting aside the interlocutory judgment for irregularity. To prove the case against the other two defendants, evidence was given that they were shareholders in the Niagara—that is, that they were among the number of those who originally subscribed stock for the purpose of building the boat, and that they became part owners by subscribing the stock-book in the year 1826 or 1827. In respect to Clement, it was sworn that he no longer retained any interest in the boat, and had not in fact since the year 1827, having then parted with his share, though his name was—by his assent, as a witness thought—allowed to stand on the stock-book. In respect to Woodruffe, it did not appear that he had ever absolutely parted with the share which he had originally subscribed. It was upon this evidence of ownership that the defendants were charged with the alleged loss of the tea; and it was objected that so far as the evidence went, it was not legal, inasmuch as the stock-books spoken of should have been produced, as the best evidence of the defendants being shareholders. The Chief Justice, who tried the cause, overruled that objection, and held it to be sufficiently proved that Woodruffe and Clement had once been owners, though not sole owners, of the steamboat. It was then proved, upon a cross-examination of the plaintiff's witness, and by two witnesses called on the defence, that so long ago as the year 1827, and long before the tea was stated to have been put on board the Niagara, which was in October 1831, the boat was placed in the hands of certain merchants in Prescott, in security for large sums which they had advanced for the outfit of the boat, and to relieve her from debt; that they were to make what use they pleased of her, and to receive her earnings until they were paid their demand; that she was from that time wholly out of the hands and control of the shareholders, who never afterwards regained possession of her, or derived any profit from her earnings, or exercised any control over her; that she

was navigated by a captain employed by the assignees in Prescott, and a clerk of theirs was put on board to receive the monies earned by her. Upon this evidence being given, it was objected that as the assignment spoken of was in writing, it ought to be produced; but the learned judge stated that he did not feel at liberty to give way to that objection so far as to exclude from the jury all evidence of the defendants having divested themselves of their interest; because the only proof offered to charge the defendants, was oral evidence that they had once been owners, which he had received, notwithstanding it was alleged that the act by which they became so was by a subscription in writing; and it did not seem consistent to exclude oral evidence that this relation of owners did not continue; and besides, the facts that the defendants, whether owners or not, were not in actual possession of the boat after 1827, or exercising any ownership over her, or receiving the profits which she made, were established independently of this objection, and indeed were not disputed; and those facts seemed sufficient to shew that the tea in question was not received or carried by any person who was authorised by the defendants to act as their agent; and this raised the question whether the defendants could, notwithstanding, be held liable for its loss. The jury found a verdict against both defendants for 45*l.*, and assessed damages against Flint to the same amount. In the last term, the assessment of damages against Flint was set aside, and also the interlocutory judgment for irregularity, and a new trial was moved for on behalf of Clement and Woodruffe, upon the law and facts of the case.

ROBINSON, C. J.—It was made a question at the trial, whether the delivery of the tea on board the boat was sufficiently proved, and whether the jury were warranted in concluding that it had not arrived at its place of destination. Upon the whole evidence, I submitted the case to the jury, telling them that if they were satisfied that the tea, being delivered on board the boat to be carried, had been lost as alleged, they would of course attribute that loss to

negligence, in the absence of proof of any cause of loss which would exempt the persons liable from answering for it. Then as to whether these defendants, or either of them, could upon this evidence be legally charged with the loss as owners of the steamboat, I directed the jury that as it was sworn that Clement did not retain any interest in the boat after 1827 or 1828, and was consequently not an owner when the injury complained of was suffered, they ought, if they believed the witness, to give a verdict acquitting him; that in regard to Woodruffe, he was not shewn to have absolutely divested himself of his shares, as Clement was stated to have done, but that both with respect to him and Clement the question was, whether they could be held liable for any loss arising from the negligent management of the boat while she was not navigated by them, or by any servant of theirs, and while the freight which she earned passed into other hands; so that in truth neither the boat nor the profits made by her were subject to their control. Upon that point, my inclination was against the plaintiff; for it appeared that these defendants could have claimed no action for the freight of the tea, while on the other hand the merchants at Prescott by whom and for whom she was employed, clearly could have sued for her freight, and would as clearly have been liable for any loss incurred by the negligence of a master actually employed by them. The implied contract appeared to me not to be with the original shareholders, but with the owners for the time. I endeavoured to convey these impressions to the jury; but not being myself altogether clear upon the point, I probably did not insist upon it so strongly and clearly as to leave no doubt upon their mind of the opinion which I entertained.

I am of opinion that a new trial ought to be granted; for it would be proper to grant it if it should appear to us probable only that Flint, against whom the plaintiff is now to proceed, may obtain a verdict in his favour; and as I really have no doubt that he must succeed upon the facts of the case, and that the verdict which has been rendered against the other two defendants is improper upon the evidence given, I have no hesitation in agreeing to a new trial. This

is a case, in my opinion, in which the plaintiff must either recover against all the defendants whom he has sued, or must fail altogether; and therefore so long as it remains doubtful whether a verdict can pass against Flint, the record, to avoid future difficulty, should stand open as to all; for a *nolle prosequi* cannot, in such an action as this, be entered against one of the defendants. Upon investigating this point, since the last term, I have no longer any doubt of it. It is impossible to draw any distinction between this case and that of *Powell v. Layton*, 2 N. R. 365: the declarations are similar, and so are the facts upon which they are grounded. The defendants are not charged upon their common law duty as general carriers, but simply upon the duty raised by their contract to carry this tea from the one place to the other. They are not charged as persons actually carrying on the business of common carriers; and if they were, the evidence would not have supported the action. Upon the authorities to be found in *Buller's N. P.* 706; *Com. Dig.* action on the case for negligence, 6 T. R. 372; 3 N. R. 365, 457; 12 E. R. 89, 453—I think it clear that this action is to be considered as founded on contract, and that the plaintiff cannot recover against one or two of these defendants only. The case of *Grout and Radnage*, 3 E. R. 70, is the only one I am aware of that may seem to support the contrary opinion; but on comparing that with the case before us in its circumstances, and after seeing the light in which that decision is regarded in other cases, I do not feel warranted by it in coming to a different conclusion than I have expressed on this point.

I think it not less clear that upon the evidence given at the trial, the plaintiffs ought not to have had a verdict against Clement and Woodruffe for the reason already stated—that the steamboat was not in the actual possession of the defendants and the other original owners, but was out of their hands, sailed by a master who was not their agent, but appointed by and accountable to others, and that under such circumstances the delivery of the tea on board the boat gave no ground for implying a contract between the defendants and the owner of the tea. Upon this point,

I will refer to the case of Chimney and Blackman, 3 Doug. and notes; and also to the cases reported in 3 Campbell, N. P. C. 354; 8 E. R. 10; 11 E. R. 435; 16 E. R. 167; 2 Bing. 179; 7 B. & C. 30; 3 B. & C. 54; 2 D. & R. 419.

If I had been as well satisfied on this point at the trial, as I am now, it is possible that the jury, receiving a more positive direction, might have given a verdict for the defendants. Still they were not misdirected; and the most just course, therefore, seems to be, that a new trial should be granted, with costs to abide the event.

The plaintiff signifying a preference to take it without costs, so ordered.

Per Cur.—Rule absolute for new trial.

HAMILTON V. WALTERS.

Where in case for the slander of the plaintiff's steamboat, it was averred in the declaration that certain persons were going on a voyage in the steamboat, and that the slanderous words were spoken in the hearing of a particular person and others, but no proof was given of the voyage, nor of the persons who were going on it, nor of the individuals in whose hearing the words were stated to have been spoken, and the jury found for the plaintiff, the Court held that the evidence did not support the declaration, and a new trial was granted without costs.

In this action for slander, the declaration in the first count stated that the plaintiff was possessed of a steamboat called the "United Kingdom," by which he was accustomed to convey passengers, goods and merchandize to and from Niagara, and divers other ports and places, for hire; and that just before and at the time of committing the grievances &c., *divers persons* were about to take passage, and would, had not such grievances been committed, have taken passage on board the said steamboat, *to go on a certain voyage* for certain hire and reward; and that the defendant, well knowing the premises, and maliciously intending, &c., to injure the plaintiff, and to induce *the persons aforesaid* not to take passage in and on board the said steamboat as aforesaid, and thereby to deprive the plaintiff of all the profits he would have acquired from the conveyance of passengers in and by the said steamboat as aforesaid, on the 20th July, 1833, at Stamford, in a certain discourse which defendant had with one Moses Edward Parmels, of and

concerning the said steamboat, in the presence and hearing of the said Moses Edward Parmels and of divers other persons, as aforesaid, spoke these words—"The United Kingdom is a very dangerous boat." The second count—under the same inducement—stated that in another discourse, on the same day, &c., which defendant had with Moses Edward Parmels, in the hearing of the said Moses Edward Parmels and divers other persons, as aforesaid, defendant contriving and intending as aforesaid, in the presence and hearing *of the said last mentioned persons*, said of the steamboat—"Her boilers are so placed that when she careens over the least on one side they are liable to burst." In a third count, under the same statement by way of inducement, it was stated, that in a certain *other discourse* which defendant had with the said Moses Edward Parmels, in the presence and hearing of the said Moses Edward Parmels and of *divers other persons as aforesaid*, he, the said defendant, contriving and intending as aforesaid, in the presence and hearing of the said last mentioned persons, said of the boat—"She is a bad boat." The plaintiff then averred the falsehood of all the expressions above stated, making this general conclusion to the three counts:—"By means of the speaking, &c., of which said scandalous words as aforesaid, *the persons aforesaid* giving credit to and believing that the said representations, &c., were true, afterwards, to wit, on the day and year aforesaid, *wholly* refused to take passage in or by the said steamboat as aforesaid, and thereby the said plaintiff lost and was deprived of all the profits, &c., which he would otherwise have derived from the passage and carrying aforesaid, and the said plaintiff hath been also otherwise greatly injured. Three other counts follow, which are introduced by stating that divers other persons were about to send certain goods and merchandize from certain ports and places on board of the said steamboat, to certain other ports and places, for hire, &c. ; and that defendant, intending to injure plaintiff, and to induce the persons aforesaid not to send their goods on board the steamboat, &c., in a discourse

which he had with Mosès Edward Parmels, in the presence of the said Moses Edward Parmels, and of divers other persons as aforesaid, falsely and maliciously spoke the words as charged in the three preceding counts: then denying the truth of the words, the plaintiff concludes thus to the three last counts:—By means of the speaking of which said false and scandalous words, &c., *the persons aforesaid*, giving credit to and believing them to be true, afterwards, &c., wholly refused to send goods and merchandize in and by the said by the said steamboat, and the plaintiff lost all the profits which he would otherwise have *derived from the passage and conveying aforesaid*; and the plaintiff hath been otherwise greatly injured, &c., to his damage of 1000*l*. To this declaration the defendant pleaded the general issue; and upon the trial at the last Niagara assizes, before Macaulay, J., it appeared in evidence that the plaintiff owned a steam vessel called the United Kingdom; and that the defendant, in the summer of 1833, resided at the Pavilion hotel at the Falls of Niagara, as agent of the steamboat Great Britain, both of which vessels navigated the waters of lake Ontario; that during the season the defendant had used expressions of ill-will towards the plaintiff generally, and had in various ways opposed his interests as respected the procurement of passengers for the United Kingdom; that he was accustomed also to depreciate the boat, and to speak disparagingly of her in the presence and hearing of travellers, in the terms specified in the declaration, and in language calculated to deter them from embarking in her, and to diminish her profits in consequence; that in June a party of six gentlemen from France, were introduced to plaintiff's agent at the Falls, and expressed their intention of going by the United Kingdom, after which the defendant disparaged the vessel in their presence, and, it was believed, accompanied them in the stage from the Falls to Niagara, the place of embarkation. The party ultimately declined going by plaintiff's vessel, and took passage in another steamboat. It was the impression of the plaintiff's witnesses that the passengers above alluded to were dissuaded from going in plaintiff's

vessel by the misrepresentations of defendant. The reason assigned by them was not allowed to be elicited in the examination in chief; but on cross-examination, a witness said that the reason assigned by the spokesman of the party was that supposed in this declaration—namely, the representations made by the defendant to the prejudice of the boat. The words defendant used on this occasion were not proved, nor was any person of the name of Parmels shewn to have been present. The jury, upon this evidence, and under the direction of the judge at Nisi Prius (vide his opinion), returned a verdict for plaintiff, which *Sullivan* last term moved to set aside, and for a new trial. The judgment of the court having been deferred, it was this day given as follows:—

ROBINSON, C. J. (after stating the case)—Taking this evidence into consideration, and comparing it with the record, the question is, whether the cause of action, as stated, is sufficiently supported. I apprehend it is not. I can see no difference between the slander of a steamboat and the slander of an inn, or any other medium of business by which profit is made. The same principle governs all. No words that can be used respecting the vessel or the inn can be actionable *per se*, like slanderous words uttered respecting the person. The words must be shewn to have occasioned damage, and then a cause of action arises. A plaintiff in such a suit may state his case in either of two ways. He may aver a general diminution of business, in consequence of the slander, relying upon his ability to make that appear to a jury, or he may aver a particular instance of damage, knowing that he can give evidence of loss in a specific case. I mean the declaration may in point of fact be framed in the one way or the other—whether in such a case as the present it can legally be framed in the general terms first mentioned, may perhaps be doubted. I have looked at the case cited, of *Browning v. Newman*, Strange 666. It is not applicable, because the words were there used of the plaintiff's character and were actionable in themselves; and moreover, the distinction taken in that case is not now recognized. Neither is the case of *Rasson*

v. Lord Breton, 1 Saund. 243, 4 Burr. 2424, material, because, from the peculiarity of the circumstances there, the damage could not have been stated more specifically. If an action would lie for an innkeeper's general loss of custom in consequence of slanderous words, it should equally lie in this case, since it may be as difficult to ascertain the names of the persons whose custom has been lost in the one case as in the other. Upon the authority of *Hartley v. Henning*, 8 T. R. 130, it may be contended that it is not necessary to name the persons whose custom has been lost; but the grounds on which that case rested are so distinct, the plaintiff having lost a specific office or situation from the slander, that it cannot be relied upon for sustaining a general allegation for loss of custom in other cases, and indeed the court are careful to declare that they do not overrule the cases which require the names to be specified, when a loss of custom is stated as the injury. From the following authorities, I consider that the statement of such a damage must specify names,—I mean where the plaintiff declares for a damage arising from a particular disappointment: *Hunt v. Jones*, Cro. Jac 499; *Wetherell v. Clarkson*, 12 Mod. 597; 2 Ld. Ray, 1007; *Wyatt v. Essington*, 2 Ld. Ray; 1410; *Niones v. Langdale*, 2 Bos. & Pul. 284; 3 B. & P. 372; *Moore v. Meigham*, 1 Taunt. 39. Indeed, the damage being the very gist of the action, and not the words, it must, like all other causes of action, be stated specifically, and any variance in the proof will be fatal, as several of the above cases determine. In the case before us, indeed, the plaintiff has not thought it safe to omit stating a particular specific injury as the foundation of his action—he intends, I think, to be specific in his declaration—he must therefore adhere to his declaration so far as he has been specific, and no evidence of any loss not specifically charged should have been attended to by the jury. I conceive him to have averred that in consequence of certain words uttered by defendant in the hearing of *Parmels* and others present with him, those persons (whether *Parmels* or not is not clear), were prevented from going on a certain voyage. No such words as those charged were proved to have been spoken

to Parmels or in his hearing ; they are proved to have been spoken in the hearing of some other persons, but of what persons or how many of them, or on what occasion, was not stated ; nor is it shewn that any one of the persons who heard those words ever intended to make a passage in the boat, or were prevented by any cause from doing so.

I doubt whether the declaration is sufficiently specific to be sustained after verdict ; but that is not now the question. No damage such as is laid was proved, and none attempted to be proved, that could have occasioned damages to the extent which the jury have given. Indeed the only evidence to support the verdict is evidence of a vague description, respecting a supposed loss of passengers not named. A declaration for such a cause of action, I apprehend, could not be sustained ; but at any rate the plaintiff, by his form of declaring, has tied himself to more particular proof, and in this kind of action he must adduce that evidence or fail. He speaks of a particular voyage, and has not shewn that any persons who heard the words proved were deterred by them from going on that voyage.

SHERWOOD, J., concurred in thinking the evidence not sufficient to support the declaration.

MACAULAY, J.—It was in the course of the evidence contended by the defendant's counsel, that the intention of the six French gentlemen to go in the plaintiff's vessel, and the cause of their relinquishing such intention, could only be proved by themselves, and not by others, as hearsay or mere inference. I thought that although they might be called, yet, as a fact, it ought to be proved by any one present that they had been introduced to the plaintiff's agent as travellers—had agreed to take passage in his boat—that the defendant used unwarrantable efforts to change such purpose, and that they eventually refused to adhere to their original promise ; that the cause assigned by them could not perhaps be shewn as mere hearsay, though as part of the *res gestæ* I was not clear that it could not, but that from all the circumstances the jury might infer the real cause without their being called to affirm it ; and that I thought there was enough shewn to warrant the inference that they

were prevented by the representations and persuasions of the defendant. It appeared to me that if it were incumbent upon the plaintiffs to call such individual traveller, in respect of whom he claimed damages, it would amount to a denial of justice, considering the description of persons whose presence would be required—namely, transitory travellers and tourists from all parts of the world, casually passing our territories to visit the great natural and wonderful curiosity which justly attracts such great numbers in the summer season. I thought the necessity of the case called for a relaxation of the rule, although in ordinary cases, and as applied to few or isolated instances, such impression might be incorrect. I still entertain the same opinion. Independent of the evidence especially applicable to the six individuals referred to, there was an abundance of testimony from which a material loss of passengers might be generally presumed throughout the season of 1833, owing to the defendant's slanders of plaintiff's boat; but no other particular instances were in proof, nor was any falling off or fluctuation of the business of the vessel shewn on the plaintiff's part. Upon the evidence, the complaint would seem rather to have been, that the plaintiff was prevented from acquiring business or patronage, by the misconduct of the defendant. No witness was called for the defence, nor did the defendant attempt to prove that his representations touching the safety and seaworthiness of the vessel were justifiable or true in point of fact. I told the jury that if the words laid in the declaration had been spoken by the defendant with the design and intention imputed to him, and that damage to the plaintiff by loss of passengers had ensued in consequence, to find for the plaintiff; that the conversations were alleged to have taken place with one Parmels, in the presence and hearing of that individual and divers others as aforesaid, but that the plaintiff had not attempted to prove the presence of Parmels upon any of the occasions in evidence; that I was not prepared to say with confidence whether the introduction of his name as one of the auditors rendered it material to be proved, but that I rather thought it might be rejected as surplusage, and so

instructed them; that fair competition between steamboat proprietors, fair expression of opinion upon the comparative merits made *bona fide*, were admissible and not actionable; and that the defendant should only be liable when transgressing bounds—aspersing the plaintiff's vessel from a desire to injure her reputation in business—in other words, maliciously; that if he exceed the license allowed in fair competition in trade—if he spoke prejudicially of the plaintiff's vessel *mala fides*—wrongfully and with the desire thereby to injure and occasion loss to the plaintiff, and that such a consequence ensued, then the plaintiff was entitled to recover; that in such an event it was questionable with me what damages should follow, whether generally all such damage as throughout the whole period the jury thought the plaintiff had sustained, or only the loss of those passengers who had been particularly specified in the evidence; that the difficulty arose from the form of the plaintiff's declaration, but that as the plaintiff had gone into evidence with a view to the whole injury, I recommended the jury to assess damages to the full extent of loss found, should they find for the plaintiff. They accordingly did so, and in a few minutes returned a verdict for 150*l*.

I am not dissatisfied with the verdict upon the whole merits of the case, but several questions of law present themselves and call in question its validity in toto, or in point of amount.

It is in the first place to be seen what evidence is admissible under the declaration, and then whether any was illegally accepted. If no inadmissible evidence was received, it would still remain a question whether it warranted a verdict for the plaintiff, and if so, to what extent in point of damages. The evidence applies exclusively to the first three counts. The plaintiff introduces them by reciting that before and at the time of the grievances, &c., *divers persons were about* taking passage in the said vessel and would have gone in her on a certain voyage, but that defendant in a discourse with Parmels concerning such vessel, in the presence and hearing of said Parmels and of divers others as aforesaid, spoke the words laid in the first count; and

that in a certain other discourse with said Parmels of and concerning said vessel, in the presence and hearing of said Parmels and divers other persons as aforesaid, the defendant, in the presence and hearing of said Parmels and divers other persons, as aforesaid, the defendant, in the presence and hearing of the said last mentioned persons, spoke the words in the second count; and that in a certain other discourse with said Parmels of and concerning said vessel, in the presence and hearing of said Parmels and of divers other persons, as aforesaid, defendant, in the presence and hearing of the said last mentioned persons, spoke the words in the third count: By means whereof, &c.

It appears to me three distinct grievances are alleged in three separate counts, all of which are laid as upon the same day, though they might have occurred and might be proved to have occurred on three different days or upon separate occasions on the same day, and that it is with reference to those three distinct grievances that he uses the indefinite term *divers*, and alleges that before and at those three periods, divers persons were about taking passage and would have gone. I do not see, therefore, that as respects this inducement, the defendant is restricted to one set of persons on one occasion, or that he is not at liberty to shew three slanderous aspersions, at three different times, before three distinct members of divers persons, being travellers. The plaintiff next asserts a conversation with Parmels in the hearing of Parmels and divers others, as aforesaid. Now, it seems to me that the words *as aforesaid* do not in each count refer to and necessarily include the whole of the divers persons mentioned in the inducement, but that they mean to point out that the divers others besides Parmels, who heard the words, were travellers who were about taking passage, and would otherwise have gone in plaintiff's vessel; and I think the evidence sufficient to go to the jury to shew that, on these occasions at least, the words laid were uttered before divers different travellers, who were thereby prevented taking passage in plaintiff's vessel. If so, the next point is, whether, being averred, it must necessarily be proved that the words were spoken in a con-

versation with Parmels. At the trial, it was not so contented; indeed the defendant's counsel conceded that there was nothing in the question I made on this head—referring to Roscoe on Ev. p. 233, which refers to B. N. P. 6.

The subject of averments requiring proof or susceptible of being rejected as surplusage, is discussed in *Briston v. Wright*, Doug. 168, and Blk. 1-4, where the distinction is taken between averments *immaterial to have been made*, but *becoming material* and *requiring proof*, because *alleged*; and *impertinent* averments, that may be *struck out* or *rejected as surplusage*, and which require no proof, though laid; and the question here, I think, is, whether the introduction of Parmels' name be a mere impertinent redundancy, susceptible of rejection, or whether it partakes of the nature of an immaterial averment, rendered material to be proved, because (though unnecessarily) introduced into the declaration. It appears to me that if in ordinary actions on the case for slanderous words, actionable in themselves on averment that they were spoken in the presence of A. and others, is supported by proof that they were uttered in presence of others, without including A.—in other words, if in such a case, A. might be rejected as surplusage, a similar rule should prevail in one like the present. The only substantial difference is, that in the one special damage must be laid and proved, and in the other it need not. There seems no distinction as respects the proof of those before whom the slander was promulgated. I do not perceive that a case of special damage like this requires any stricter proof touching the colloquium, than an ordinary case of slander, imputing crime, on the ground that the name introduced points to some specific conversation, and might mislead the defendant in his defence. The same argument and the same inconvenience might equally apply to or attend a case in which damage results from the words spoken as a legal consequence. The first just test, I think, is to determine whether the declaration would remain good, or at least as good as at present, if the name of Parmel were rejected. It would then read thus:—Defendant, in a certain discourse concerning said vessel, in the presence and hearing of divers persons, as aforesaid; or, in a certain

other discourse, of and concerning said vessel, in the presence and hearing of divers other persons, as aforesaid, defendant, in the presence and hearing of the said last-mentioned persons, spoke the words. A declaration thus framed would, I think, be quite as good as the present. I see no object for the introduction of Parmels' name. He is not alleged to be a traveller, or about to take passage, and would seem as mentioned to have been, if present at all, a mere casual auditor, in common with divers others. The material point is to aver a publication in sufficient terms, which may be effectually done without connecting the name of Parmels in the colloquium. It seems to me, therefore, that such name may be rejected as surplusage, and requires no proof.

The only remaining point is the subject of damage, touching which I feel more doubt than upon any other. The question is, whether under this declaration the plaintiff can recover damages for whatever loss he sustained, or is restricted to a single voyage, or to such special instances of loss as he could expressly prove. The evidence I deem sufficient to establish special damage, even to the extent of the verdict. The only difficulty is, whether special damages generally can be received under this declaration; and that seems to me to depend upon the comprehensiveness of the inducement and breach. The words are not actionable *per se*—the plaintiff must allege and prove special damage; but such special damage may be laid in general terms, and is often a matter of vague computation. The case of *Ashby v. Harrison*, 1 Esp. N. P. C. 49, as reported, shews this. It is a case of special damage, yet such damages are laid in general terms.—Cro. Jac. 499, 8 T. R. 130, 1 Taunt. 39, 11 Price 19. Mr. Starkie says (p. 180) that “whenever damage arises in consequence of a false imputation, wrongfully published, an action is maintainable on the ground of such specific damage;” but the precise nature of such damage must always depend upon the subject matter. And in books of forms, special and general damages will frequently be found blended in the same declaration. In the case before us, the substance of the damages as laid is, that

divers persons who were about going in plaintiff's vessel, and would have gone in her a certain voyage, were deterred from so doing by reason of the plaintiff's slanders on three several occasions, whereby plaintiff was deprived of the profits which would otherwise have occurred to him. Thus far it may be said the plaintiff is restricted to the three specific occasions embraced in the three counts, and probably to one voyage. The declaration, however, concludes by alleging generally, "that the plaintiff hath been *otherwise* greatly injured and damnified"—that is, by means of the speaking the words in the three counts mentioned. Then can the plaintiff, under this general averment, recover beyond the special damage previously laid to enable him to do so, or was it incumbent upon him expressly to have declared how *otherwise* he had been greatly damnified, as that divers other persons, at divers other times, were prevented taking passage, &c. A course which I think might have been adopted upon the authority in 8 T. R. 130 ; 1 Saund. 234, 251. The latter, at least, was, I think, essential ; and it forms still a question whether that would suffice. My own impression is, that it would be specific enough, considering the nature of the subject and all the circumstances ; but being omitted, and the declaration as concluded sounding only in vague, uncertain damage, the nature of which is not named, I apprehend the plaintiff could not go beyond the special damages laid. In either case such damage is unliquidated, and the verdict may not be exceptionable in point of amount, if it be regarded as the finding of the jury restricted to such special damage, but I directed them to comprehend in their verdict all the damage they found to have occurred to the plaintiff from loss of passengers by reason of the defendant's misconduct during the whole course of the slanders in evidence, and did not instruct them to confine themselves to the damage arising from the words laid upon any three or fewer occasions in which they were uttered, without regard to their repetition at other times, or to other consequential damages occasioned by their propagation. If the latter ought to have been done, then was there a misdirection in a material point. Had

the direction been right and the verdict the same as at present, I should have perhaps been unwilling, after what I heard at the trial, to have disturbed it on the ground of excess, if the declaration were sufficient in law, for the number of persons prejudiced against the vessel at any one time, except when the six foreign travellers are spoken of, is altogether uncertain. I conceive, however, that the plaintiff, under this declaration, is limited in his right of recovery, and that such right was by me submitted to the jury in terms more comprehensive than the nature of the pleadings warrant. I question whether the plaintiff can recover for anything more than the loss of the passengers on the certain voyage, of which only specific evidence was adduced. He certainly, I think, cannot for more than three voyages, and the three counts seem to relate to one only, though they may be extended to three distinct acts of slander, published before three separate numbers of travellers, who had intended going such voyage; and it would still remain a further question, whether the plaintiff should not have named the persons whose patronage he lost, and have specified the voyage more particularly, as he points to one or more specific occasions of speaking, and to one or more specific voyages. Without expressing any opinion upon the latter points, I think the present verdict should at all events be set aside, and without costs.

3 Esp. 134; 2 B. & P. 289; 3 B. & P. 372; 1 Esp. 49; Bull. N. P. 6, 7; 2 Burr. 772; 4 Burr. 2124; Str. 566; Cro. Car. 499; 8 T. R. 130, 459; 1 Taunt. 39; 1 Sten. 172, (2); 2 Saund. 44; 7 T. R. 253; 1 Price, 109; 2 Ch. Pls. 628, 38; Ld. Rayd. 831; 1 Lev. 140; 1 Roll's Abt. 58; W. Jon. 196.

Per Cur.—Rule absolute.

DOE EX DEM. SAMSON V. PARKER.

Where, in ejectment by a mortgagee, the tenant claimed possession under a lease from the mortgagor, and refused to attorn to the mortgagee (who demanded possession), and shewed no lease nor any certain holding: *Held*, that he was not entitled to notice to quit.

This was an ejectment for the recovery of lands in Belleville, in which a verdict was found for the plaintiff,

subject to the opinion of the court as to whether defendant was entitled to notice to quit. The lessor of plaintiff, it appeared, was mortgagee of the premises in question, and, after the mortgage was forfeited, brought this action against the tenant in possession, laying his demise at a period when, according to the terms of the mortgage, he was entitled to possession. The defendant objected to his recovery, because he had given no notice to quit, which he contended he was bound to do, because he (the defendant) went into possession under the mortgagor (one Murchison) before the mortgage was made. This point was argued in the last term upon a rule nisi, by *Samson* for plaintiff, and *Washburn* for defendant; and having stood over, the court this day delivered their judgment, as follows:—

ROBINSON, C. J.—Upon the evidence given at the trial, I thought in this case no notice to quit was necessary; for it appeared that the lessor of the plaintiff, before bringing his action, had called upon the defendant to give up possession, but that the defendant refused, adding that he knew nothing of the lessor of the plaintiff's right, and would not recognise him as his landlord; that he had taken the premises of the mortgagor at 20*l.* a-year; that the mortgagor owed him a large debt, and that he would keep possession of the place till he was paid. The defendant, however, has produced no lease, nor proved any certain term granted to him by Murchison, nor shewn any right to maintain possession in consequence of an agreement made prior to the mortgage; and since he has chosen to decline attorning to the mortgagee, and, on the contrary, holds adversely, setting him at defiance, but shewing no right to do so, I am of opinion that he was not entitled to notice to quit, and that the verdict was proper.—B. N. P. 96; Peake, N. P. C. 196; 4 Bingham, 557.

MACAULAY, J.—It appears to me the defendant refused to attorn to or acknowledge the plaintiff as a landlord, or to surrender to him the possession of the premises, on the ground that he had a lien thereon for a debt due to him by the mortgagor, from whom he received possession originally. But he failed to prove any right to hold at a certain annual

rent, to be paid by the liquidation of his demand, as alleged. No assent of or agreement with the mortgagor to this effect was shewn, nor was there any proof of a continuing right of possession at the date of the demise under any terms entered into with the mortgagor before the mortgage to the plaintiff's lessor. Under such circumstances, connected with the refusal to recognize the paramount right of the lessor of the plaintiff, I do not see that a demand of possession or notice to quit was required before ejectment brought. The defendant did not hold under the plaintiff—he refused to admit his right to the possession, claiming it himself under a previous arrangement with the mortgagor. Yet no arrangement authorizing such holding was proved—consequently no right was in evidence beyond the naked fact that the defendant received the possession of the mortgagor before mortgage to the plaintiff's lessor, upon terms (as expressed) which did not warrant the holding over. Indeed, it would rather seem that the defendant, having acquired the possession without regard to the payment of his alleged demand, afterwards sought to convert it into a lien, and asserted an intention to hold upon a ground apart from the terms upon which he originally entered, by which act he would forfeit all right to a notice or demand of possession even as between himself and the mortgagor. There is no rule of law by which a tenant for a year can assert a lien upon the estate for a simple contract debt, and claim to hold over in order to pay himself out of the profits, unless sanctioned by his landlord; and such sanction being wanting in the present case, leaves the defendant unsustained by any valid defence against this action.

Per Cur.—Rule discharged.

EASTWOOD & SKINNER v. HELLIWELL.

Where the plaintiffs, who had built mills on a stream, by indenture granted a license to the defendant to make a race-way over their lands, for a mill to be built by the defendant further down the stream, provided that the water was not thrown back thereby, nor any injury nor damage occasioned to the plaintiff's mills, and after the defendant's mill was built, by an accumulation of ice on the by-wash, the water was forced back on the plaintiff's mills: *Held*, that the plaintiffs might maintain an action for such injury, and that case, and not covenant on the indenture, was the proper form of remedy.

This was an action on the case for backing water upon plaintiffs' mill, and was tried at the last assizes for the Home district, when a verdict was taken for the plaintiffs, subject to the opinion of the court on several points reserved at the trial, and generally whether the action was at all sustainable under the evidence given. The declaration contained two counts. The first count stated that, before and at time of the grievances complained of, the plaintiffs possessed a paper mill, and enjoyed the benefit of a certain stream or water course, which ought and until, &c., did run and flow from the river Don above said mill to the mill, and thence to the said Don below said mill, without being flowed back or dammed back upon the said mill or the wheels or apron thereof; well knowing and unjustly intending, &c., on the 21st December, 1829, and divers days and times in the winter season, between that day and the commencement of this suit, by and with a certain dam and waste gate, wrongfully and injuriously did, by turns, flow back and draw off the water of the said water course, and thereby cause great quantities of ice to accumulate on and about the said by-wash and in the said water course, thereby greatly obstructing the same; by means of which said dam and waste gate and ice the water was wrongfully and unjustly dammed back and flowed back by defendant upon plaintiffs' mill, and the water wheel and apron thereof, and the water stopped from running in its usual course, &c. The second count stated that plaintiffs were possessed of another paper-mill, and had enjoyed and ought to enjoy the benefit of a certain stream or watercourse, which had run and flowed and ought to run and flow from the Don above the plaintiff's mill, to the mill and into the Don below it, to supply such mill with water, without being flowed back or dammed back upon the said mill, or the wheels or apron thereof; yet that defendant, wrongfully intending, &c., at divers times wrongfully dammed back and flowed back divers large quantities of the water of the said last-mentioned stream or water-course upon the water-wheel of the said mill, and hindered and prevented divers large quantities of water from flowing from the plaintiffs' mill.

along its usual course, and thereby greatly obstructed the said mill. The plaintiffs then, in a general conclusion, claimed damages to the amount of 500*l*. The defendant pleaded the general issue; and at the trial it appeared in evidence that by deed indented, the plaintiffs, in 1827, for a pecuniary consideration, granted to the defendant and one John Helliwell, "the right, license and permission to cut a race-way, to be made and kept not above ten feet wide, provided with flood-gates at the head, and also a dam across the river to secure the water in the said race-way, to be made no higher than is necessary to turn the water into the said race-way, which is to lead from and out of the river Don to the present race-way of the said Eastwood and Skinner, below the grist-mill of the said Eastwood and Skinner, and from the said race-way of them the said Eastwood and Skinner into the land and premises of the said Thomas Helliwell, as marked out in the plan hereto annexed, for the purpose of conveying such water as may be necessary for mills and other machinery erected or to be erected on the land of the said Thomas Helliwell and John Helliwell, with full power, license and permission for them the said Thomas Helliwell and John Helliwell, their heirs, &c., to enter and continue on the premises of the said Eastwood and Skinner, for the purpose of making or constructing the said raceway, when and so soon as they may think proper, and also from time to time, &c., to have ingress, egress, &c.; provided, &c., that the license and permission so hereby granted to lead off the water from the raceway of the said Eastwood and Skinner, through a raceway to be made by the said Thomas and John Helliwell, shall be and is hereby limited in such manner as that the apron of the present grist-mill of the said Eastwood and Skinner, according to its present level, shall form the top level of the privilege of water so intended to be granted to the said Thomas Helliwell and John Helliwell; to insure which a by-wash shall be made by the said Thomas Helliwell and John Helliwell in the old tail-race of the said Eastwood and Skinner, level with the apron of their grist-mill and paper-mill, thirty feet wide; and that the bottom level of the said race-way shall be where the line between

lots numbers twelve and thirteen crosses the river Don, so that it shall embrace the fall from the apron to the said line; and the said race-way, so to be cut as aforesaid, shall in no wise occasion injury or inconvenience to the mills of them the said Eastwood and Skinner, now in operation, by throwing back the water on their water-wheel or apron at any time whatsoever."

It was proved that defendant dug a race-way accordingly and laid down the by-wash as prescribed, and erected mills of his own below that of the plaintiffs; that afterwards the plaintiffs' mill was often stopped in the winter, the water being backed sometimes to the height of twenty-eight inches on plaintiffs' wheel, by formation of ice on and below the by-wash, occasioned by the defendant's opening and shutting his gates alternately in severely cold weather, such as preventing the escape of the waste water from the foot of the plaintiffs' tail race through their race-way into the Don, and turning it back upon their water wheel, the defendant's waste gate being higher than the foot of the plaintiffs' apron, preventing the passage of the water past his mill. It was asserted by some of the witnesses, that if the defendant's waste gate was not higher than the plaintiffs' apron, the water would not be thrown back; that if the waste gates of defendant were not higher than the apron of plaintiffs, the water would escape over them, rather than back upon plaintiffs' mill, although obstructed at the by-wash; that the water could not be backed upon the plaintiffs if the waste gate of defendant as well as the by-wash were not higher than the foot of plaintiffs' apron; if the gates were not higher the water would flow down so as not to obstruct the plaintiffs; that any water flowing over defendant's gate would run into his race and into the Don below; that if defendant's gate was not higher than the by-wash, the water would always pass over such gate when higher than the level of the by-wash, and *that* whether the mills were going or not. It appeared further, that the raising and shutting of defendant's gates in winter were necessary and proper operations to enable him to work his mill, and that the same had not been opened and shut vexatiously in order

to promote the accumulation of ice at the by-wash, but such formation of ice attended the ordinary bona fide enjoyment of the water by defendant ; that before the grant of this easement to the defendants, the plaintiffs had more or less trouble in the winter season from the ice, and had occasionally to cut it away, but that the evil was much increased since the erection of the defendant's works, so much so that the mill is now stopped a month or two in the course of the year. It was not seriously disputed but that the by-wash was placed conformably with the indenture in that behalf, and it was represented that in summer it admitted the escape of the water with sufficient freedom, so that defendant's gates at such season caused no impediment or injury to plaintiffs, but that the by-wash did, owing to the ice in inclement weather with severe frost ; that defendant could not use his mill without leading to the formation of ice, which could not be effectually cleared away or removed, as it formed in the race below the by-wash, so as to obstruct the exit of any water passing over it ; and that, even could the ice be prevented at the by-wash, it would freeze where the escape race enters the Don below. It also appeared, that since the indenture of 1827, the plaintiffs had renewed their works, but it was not established that the wheel was set any lower, or, at least, in any sufficient degree to cause a perceptible difference in the effect of backwater ; and on the defence, the obstruction from ice previously experienced by the plaintiffs was further proved, and that the ice at and below the by-wash (not supposed to be contemplated at the time the agreement was entered into) was the sole cause of the back-water complained of in winter. A nonsuit was moved for on several grounds : First, on the ground that there was no proof that the defendant had raised the water higher than expressly authorised by the indenture ; secondly, that there being no stipulation in the indenture touching the gate, its terms are complied with so long as the wash does not exceed the limits therein prescribed ; and thirdly, that the defendant is not so far restricted or limited in the grant, as that no damage should accrue to the plaintiffs from the

elements, although indirectly accruing from the defendant's enjoyment of the easement according to the expressed restrictions of the grant; fourthly, that the grant of the privilege, being the plaintiffs' own grant, should be continued most strictly against themselves; fifthly, that the action should have been in covenant, and not case, or a special action on the case, setting forth the grant and excess complained of, and not a general action on the case in the form adopted. These points were reserved at the trial, and the Chief Justice recommended the jury to find such damages for the plaintiffs as they deemed just, subject to the opinion of the court thereon, with liberty to enter a nonsuit should the court be in favour of the exceptions. The jury having found for the plaintiffs 100*l.* damages, *Draper*, for the defendant, moved last term to set aside the verdict and enter a nonsuit on the objections taken at the trial.

ROBINSON, C. J., declined giving any opinion, having when at the bar drawn the agreement.

SHERWOOD, J.—It is unnecessary, in my opinion, to remark upon any one of these objections separately, with the exception of the last; because the whole case was ultimately reserved, in general terms, for the determination of this court, on the entire evidence, considered relatively to the legal construction of the agreement itself; and therefore the first four objections may be embraced in general observations on the question, whether the action be sustainable. The last objection, however, goes to the form of the action, and demands a particular enquiry; because if it were valid, there would be an end of the case at once, and further enquiry would be useless. I incline at present to think the last objection cannot be supported, and that the declaration is good. The evidence clearly shows that the plaintiffs first occupied the stream of water which flows down their race-way and through their land by erecting mills upon it long before the defendant and his brother built their mills or became the owners of the land below, and therefore the plaintiffs, as the prior occupants and owners of the land, had a right to a free use of the water. This doctrine is advanced in *Luthel's case*, 4 Coke 87, and again in 2 Blk's.

Com. 406, where it is said, "If a stream be unoccupied, I may erect a mill thereon and detain the water; yet not so as to injure my neighbor's prior mill, or his meadow; for he hath, by the first occupancy, acquired a property in the current." This legal position is also recognized in *Beady v. Shaw & others*, 6 East 208, in *Saunders v. Newman*, 1 B. & A. 258, and in *Liggins v. Inge and another*, 7 Bing. 682, as well as in many other reported cases. As the plaintiffs shew a prior occupancy of the water flowing through their own lands, and an obstruction in its course below their mill by the act of the defendant, which undoubtedly works an injury to them, they establish, in my opinion, a *prima facie* case of right on their part, and a misfeazance by the defendant sufficient to support this action, unless the defendant can show some legal justification of his act founded on the agreement already mentioned, or some solid objection in law to the form of the action. To effect the latter, he produces the written instrument, and insists that no action on the case lies after a contract has been entered into between the parties respecting the subject-matter of the suit, in case the contract was made before the commencement of the action. If any action lies under such circumstances, it must be upon the contract. I am not prepared to say whether an action for flowing back the water would lie on the agreement or not; but assuming that such an action might be brought, still I think the party injured has his election to bring an action for the tort, if it should seem advisable. The cases of *Clifton v. Dickson*, 2 Wil. 310, and *Stuart v. Gordon*, 2 Wm. Blk. 848, appear to me to be in point. I consider, therefore, that the plaintiffs have adopted a correct form of action in this instance; and it remains to be ascertained whether the present suit is legally sustained by the evidence. This must depend upon the proper construction of the agreement.

It appears that the plaintiffs, some years before 1827, had turned a part of the water of the river Don from its natural course down a race-way opened on their own lands, and upon this race-way had erected several mills; and in that year, the defendant and his brother, wishing to form a site

for mills in the same manner, purchased from the plaintiffs a small parcel of land lower down the river, together with the right of building a dam across the river and forming a race-way to conduct the water from the stream to their own premises through the adjoining lands of the plaintiffs. This right to erect the dam and form the race-way, as expressed in the deed itself, was "for the purpose of conveying such water as may be necessary for the mills and other machinery erected or to be erected on the lands of the said Thomas and John Helliwell." If the agreement stopped here, there could be no doubt the plaintiffs would fail in their action; but a proviso is afterwards added which qualifies the unrestricted right, and reduces the whole matter to one point—namely, whether the defendant has exceeded the license or privilege granted to him and his brother by the clause of the agreement last mentioned, taken in connection with the limitation of the right or permission expressed in the proviso. The words of limitation are these:—"Provided nevertheless, that the license and permission so hereby granted to lead off the water from the race-way of the said John Eastwood and Colin Skinner through a race-way to be made by the said Thomas Helliwell and John Helliwell, shall be and is hereby limited in such manner as that the apron of the present grist mill and paper mill of the said John Eastwood and Colin Skinner, according to its present level, shall form the top level of the privilege of water so intended to be granted to the said Thomas Helliwell and John Helliwell." This limitation undoubtedly restrains the defendant from raising the water higher than the level of the apron of the grist mill and paper mill; but if he use it within such bounds and damage accrue to the plaintiffs, I think no action would lie for its recovery. So long as the water remains at or below the prescribed level, the defendant can detain it in his race-way, allow it to escape, or force it back into the race-way of the plaintiffs by means of his dam below. I think, on the other hand, he can have no legal right to the use of the water exempted from contingent damages, in case he raises it above the stated level, unless the clause immediately succeeding the one last cited.

should be found to confer it. It appears by the deed to have been the express intention of the parties that the apron of the grist mill and paper mill should form the highest level of the water which the defendant had permission of the plaintiffs to use as stated in the agreement. The next provision is as follows:—"to insure which a by-wash shall be made by the said Thomas Helliwell in the tail-race of the said John Eastwood and Colin Skinner, level with the apron of their grist mill and paper mill, and thirty feet wide." Now I take it for granted that the by-wash made by the defendant and his brother in the race-way of the plaintiffs, was precisely conformable to the provisions of the agreement in all respects, because there was no allegation to the contrary either by the plaintiffs themselves or by the witnesses examined at the trial. There can be no doubt that in order to keep the defendant's mills in operation, it was necessary, at times, to allow the water to flow out of their race-way, and, at other times to detain it there, or to force it back into the race-way of the plaintiffs. The effect of this continued alteration in the use of the water during the winter was to occasion the formation of ice on the by-wash, and which of course prevented the passage of the water over it to a certain extent. Now the defendant insists that the written agreement is substantially complied with, and that no action will lie for the recovery of damages sustained by the plaintiffs, so long as the top of the by-wash is no higher than the level stated in the deed. The ice on the top of the by-wash he very properly considers as no part of it, but he at the same time seems to think it is the cause of the flowing back of the water from the by-wash to the plaintiffs' mill. The accumulation of that ice is the effect of natural causes, over which he can have no control, and respecting which he made no covenant; and he contends, therefore, that he cannot in justice be made accountable for the consequences. This argument, however, does not appear to me satisfactory, under the facts of the case. The written agreement clearly proves that the plaintiffs permitted the defendant and his brother to erect a dam or by-wash in the plaintiffs' race-way, for the express purpose of

arresting the course of the water in that direction, and of turning it down the race-way of the defendant, in order to form a mill-site for him further down. This advantage the defendant took upon a proviso that he would use the water without injury to the plaintiffs—or, in other words, so long as it did not rise above the apron of the plaintiffs' mill, which was situated further up the stream. To insure this, the by-wash was formed in such a manner as to allow the water to pass over it, if it rose above the prescribed level; and both parties, as appears by the evidence, most probably supposed that all the surplus water—that is, the water above the stipulated level—which might be forced back by the dam of the defendant, would retrograde no further towards the plaintiffs' mill than the point where the two race-ways intersected each other, and would there make its exit down the plaintiffs' race-way and over the by-wash into the Don. They were partially disappointed, however, in this expectation; for notwithstanding the redundant water goes over the by-wash for three seasons in the year, it is obstructed in the winter by the ice, and in consequence of that impediment continues its backward course quite to the plaintiffs' mill. There is no doubt that all the water which flows to the defendant's mill, comes down through the plaintiffs' race-way; and it is equally clear that the water would not return to the race-way and the mill of the plaintiffs, if the defendant's dam were not so high as to raise it above the level of the plaintiffs' water-wheel. Two of the plaintiffs' witnesses were of this opinion; but independently of their testimony, I think the proposition self-evident, because the fluidity of the water naturally conducts it from a higher to a lower situation. It is fully proved that the water receded from the defendant's dam, and overflowed the plaintiffs' mill-wheel. I am quite satisfied, therefore, that the dam of the defendant is the cause of raising and forcing back the water above the level stated in the agreement. No ice would be formed on the top of the by-wash sufficient to occasion damage, if the water was not raised above its proper level by the defendant's dam.

I cannot agree with the defendant's counsel in thinknig

that the indenture made between these parties, and which contains the agreement respecting the easement or right to the use of the water in a certain mode, should necessarily be construed most strictly against the grantors. Lord Coke, in Inst. 42 a, 183 a, and 273 B., does certainly state a maxim of law which, considered alone, would sustain the legal position advanced by the defendant; but there are authorities the other way even of that time—such as Owen 251, Leon 246, and subsequently 8 Mod. 312, which make a distinction between an indenture and a deed poll. The words of an indenture granted by both parties are to be considered the words of both, but in a deed poll they are the words of the grantor alone, and for that reason are sometimes construed most forcibly against himself. The general mode of construction, however, is this—"that it be as near the minds and apparent intents of the parties as the rules of law will admit." Now I am of opinion, from the nature and whole scope of the agreement, that the plaintiffs never intended to grant to the defendant the right to raise the water, or make use of it above the prescribed level, because if they did so it is quite evident they would confer upon him a right to stop the operations of their own mills at his pleasure, which would be contrary to all probability, and against the spirit of the agreement itself. The language of that part of the contract which mentions the by-wash, if considered alone, might raise a doubt whether the grantors were not willing to incur all risk with respect to any injury which might accrue to their mills, provided the grantees did make the by-wash in the mode therein prescribed; but when it is read and compared with the preceding and the subsequent parts of the instrument, all doubt on the subject seems to be removed. The grantors intended, in my opinion, to give the grantees permission to make a by-wash in such a manner, as that all water thrown back by the defendant's dam would make its escape in that direction, and of consequence would never impede the working of their own mills; but I do not think they intended to take upon themselves any part of the responsibility as regards the sufficiency of the by-wash in that respect. The

very last clause in the agreement is altogether against the contrary opinion:—"And that the said race-way, so to be cut as aforesaid, shall in no wise occasion injury or inconvenience to the mills of them the said John Eastwood and Colin Skinner, now in operation, by throwing back the water on their water-wheel or apron, at any time whatsoever." The ice on the top of the by-wash is formed in consequence of raising the water above the level agreed upon by the parties, and of the draining it off during the prevalence of severe frost. The dam of the defendant causes the rise of the water above the top of the by-wash, and the opening of the flood-gates causes its fall below that level; so that the plaintiffs are ultimately damaged in consequence of the act of the defendant having its inevitable and natural effect on a body of water situated as the one in question is during the winter season.

As the plaintiffs, in my opinion, gave no express or implied consent, by the agreement, to the raising of the water by the defendant so high as he did, I think this action is sustainable upon the same principle that it would have been if no agreement had been made—which is, that where one man has lawfully occupied a mill-site, and afterwards another man erects a dam below, whereby the water is forced back, to the injury of the first occupant, the owner of the dam below is answerable for all damages. I therefore think the *postea* should be given to the plaintiffs.

MACAULAY, J.—It seems in order to dispose of the last objection in the first instance; and I am of opinion that the action is properly in case, and could not have been conceived in covenant. There is no express covenant on the defendant's part to do anything, but a license is granted him by the plaintiffs to enjoy a certain easement, restricted in its nature and extent. It might be implied that he covenanted to lay down a by-wash of certain dimensions; and if so, it has been done. I am not prepared to say it can be held to form a constructive covenant of the defendant, that what he was allowed to do should not occasion back water, or that he would not exceed or transgress the privilege or license granted to him by the plaintiffs. So long as

he keeps within the license, it protects him and affords a good defence in case under the general issue, but it cannot do so in the event of an excess being proved; and as I understand the present case, the plaintiffs complain of an excess—of something done or continued by the defendant, not sanctioned by, but exceeding or repugnant to, the qualified license or easement granted and allowed. It is for an injury not covered by the license that the plaintiffs complain, and I think properly in this case. It forms matter of defence for the defendant to shew that such license protects him. It was not contended that if case be sustainable, the declaration was not sufficient; but at first I felt some doubt on that point. I am, upon consideration, disposed to think, however, that the declaration is so shaped as to meet the evidence, although it might have been more specially framed, with a recital of the license and averments of injuries occasioned under colour thereof, incompatible with and not authorised by its terms. The complaint in the first count is, that the defendant, by his dam and waste-gate, wrongfully and injuriously by turns flowed back and drew off the water of the said watercourse upon the by-wash. Now so far the act was not wrongful, for he has a right to flow back and draw off the water. But the declaration proceeds to state, that thereby the defendant caused great quantities of ice to accumulate in and about the by-wash. That too was blameless, if it produced no injurious consequences to the plaintiff. But they add, that by means of the dam, waste-gate, &c., the water was flowed back upon plaintiffs' mill. This injurious consequence was wrongful.

In the second count, it is alleged in more general terms that the defendant wrongfully dammed and flowed back large quantities of water upon plaintiffs' water-wheel; and I think the facts in evidence tend to support such a declaration, unless the license defeat their effect. In determining whether the evidence sustains the declaration, before applying it to the license, I would notice the allegations made and material to be proved. It is, by way of inducement, in the ordinary form, recited, that defendant was possessed of a

water-course, and entitled to its uninterrupted enjoyment. The evidence is that he possessed a mill-race uniting with the river Don at two points, the one above and the other below the plaintiffs' mill, through which a portion of the waters of that stream were diverted to such mill, and thence conducted into the river again. This race is the water course claimed. It is not complained of that a by-wash is placed in this race below the plaintiffs' mill, but that by a certain dam and waste gate the defendant flowed back and drew off the water upon the by-wash. The evidence is that the defendant had constructed such dam and waste gate, and that he was accustomed to draw off and flow back the water as alleged. It is next alleged that thereby great quantities of ice accumulated in and about such by-wash and obstructed the old water-course. The evidence shews this to have been the consequence. It is then asserted that by means of such dam, waste gate and ice, the water was flowed back upon plaintiffs' mill, &c. The material allegations in the first count are therefore sustained, and being caused by defendant, the essential points of the second count are likewise so far established.

The next and important point is, whether these acts, or the proximate cause of the injury (for they are found to be injurious) occasioned to the plaintiffs, was wrongful on the part of the defendant, or justifiable under the license.

It is true that a deed when ambiguous is to be construed most strongly against the grantor. It is equally true that such deed is to be construed altogether in conformity with the true meaning of the parties as far as such meaning can reasonably be extracted or gathered from the terms of the instrument. In construing the indenture before us, it is to be noticed that the plaintiffs possessed the water-course since obstructed, and that the defendant clearly could not encroach upon it without their sanction; also, that the plaintiffs had a mill erected thereon, to enable them to use which it was essential that the water should be allowed freely to escape from the tail-race of such mill into the Don—a result physically certain, so long as an exit was insured, with sufficient freedom to prevent the waste water attaining

a higher level, from obstruction or accumulation, than the apron of the plaintiffs' mill. The plaintiffs possessing and enjoying this advantage, it appears the defendant was desirous of acquiring a right to a similar race from the Don below the plaintiffs' mill but above the termination of the plaintiffs' race-way; such race-way of the defendant to pass through the plaintiffs' land and to intersect and cross transversely the race-way of the plaintiffs at a point below the plaintiffs' mill, and thence through the defendant's land into the defendant's adjoining close, and eventually into the Don again, lower down the river than the point at which the plaintiffs' race empties itself into that stream: that the plaintiffs were willing to grant the easement to the defendant, provided it could be effected without detriment to themselves; and with that and other views the indenture in question was executed. It grants to the defendant a right to dig the race-way he has since opened; but such grant was not a general but a qualified license—namely, to cut a “channel not exceeding ten feet in width, provided with flood-gates at the head, and a dam across the river to secure the water in the side-race”—that is, to turn the water from the Don into the defendant's race, “to be made no higher than is necessary to turn the water into such race-way,” to follow a course specified and supposed to be designated on a plan annexed “for the purpose of conveying such water as might be necessary for mills and other machinery erected and to be erected on the defendant's land.” It is not suggested that the race-way made deviates from the proposed line—that it exceeds the width limited—that the dam across the river is too high—that flood-gates were not erected, or that defendant diverted more water than was necessary for the mill or machinery. So far the license is comprehensive, and the defendant is not accused of its infraction; but the indenture immediately after contains a proviso or qualification, to attend and accompany the foregoing—namely, that the license or permission thereby granted, was limited in such manner as that the apron of the grist-mill of plaintiffs, according to the then level, should form the top level of the privilege of

water so intended to be granted. I should infer from this proviso, that the defendant might, in the literal terms of his grant, have otherwise impeded the plaintiffs, by diverting too much, or by raising the water to a level higher than the apron of their mill. Being allowed to intersect their race-way with a channel ten feet wide, but being unrestricted as to depth or height of water, he might have sunk much deeper than the plaintiffs' race, and perhaps thereby have diverted the whole of the plaintiffs' escape-water from its more direct and free course to the Don, by turning it abruptly into the defendant's race—or, if it could not be thus effected, it might be thought consistent with the easement granted, for the defendant completely to shut up the race of plaintiffs below the intersection of his own race, whatever its depth might be, so that the plaintiffs' waste water must necessarily pass off to the defendant's works, at whatever angle his race formed with that of the plaintiffs. To obviate inconvenience to the plaintiffs in this way or otherwise, the indenture provides that the license is to be so limited that the apron of their mill shall form the top level of the defendant's privilege of water—not at one season of the year rather than another, but at all times. Thus far the width of the defendant's race is fixed; the course of it is ascertained, and without regard to depth, the top level of the water therein, so far as such level might influence the level of the water between the plaintiffs' mill and the point at which the one race crossed the other, is declared to be the apron of such mill. Next follows the clause touching a by-wash, and which appears to me to be inserted, *ex abundante*, not to enlarge the defendant's privilege beyond the previous proviso—not to destroy or render ineffectual that part of the specification, but the more effectually to ensure the same. The introductory words, "to ensure which," suggests the question, to ensure what? We must look to what the relative "which" refers, and it is obviously to ensure that which the proviso limits—namely, that the apron of plaintiffs' mill should form the top level of the privilege of water intended to be granted, to ensure which a by-wash was to be made; and it would be strange if the

very step required in order to ensure it, should be allowed to work the contrary effect. But to ensure it, a by-wash was to be made by the defendant in the old tail-race of plaintiffs, level with the apron of their mill, thirty feet wide. The plaintiffs' race, as was asserted during the argument, may have been thirty feet wide, and that be the reason for the width assigned to the by-wash. It is obvious from this arrangement, that the by-wash would turn from the old race of the plaintiffs into the new race of the defendant, all the escape-water below the level of the plaintiffs' apron, or below the top of the by-wash. Whence I infer, that although not expressed, it was intended that the old race should be obstructed; and I suspect the clause about the by-wash was in some measure introduced in order to determine the utmost limit to which such old race should be obstructed or dammed up. It seems evident that if plaintiffs' race was thirty feet wide, and the defendant's only ten, the latter could not in all probability well conduct the water to the defendant's mill, unless sunk deeper than the plaintiffs' race, or unless the latter were dammed across; for the water from the Don, in passing through the defendant's channel of ten feet, would, on meeting the plaintiffs' race of thirty feet, merge in it and turn off to the right, through the latter, instead of flowing onward through the ten-foot channel leading to the defendant's premises. The defendant consequently does not seem restricted as to depth, but as to height; and instead of being at liberty to retain the by-wash erected at all hazards, it seems to me he can only do so when it proves harmless to the plaintiffs. No specific height is fixed—that is to be determined by the water level. If in summer the present by-wash does not cause too much backwater, then in summer it is permissible under the lease; if in winter it becomes clogged with ice, and so indirectly causes injury to the plaintiffs, then it appears to me unauthorised. I think that under all circumstances the plaintiffs are not to be obstructed by backwater, and that the easement is only granted *sub modo*—i. e., provided the plaintiffs are relieved from backwater exceeding the level of their apron. This view I should feel obliged to

adopt, was the by-wash the sole cause of the injury ; because it is merely mentioned with a view to prevent such injury ; and it is inconsistent with the obvious meaning of the parties, and the spirit of the arrangement, that the defendant should be allowed to maintain it, although it produced the very ill it was designed to obviate. The onus is upon the defendant to prevent injury by backwater. The proviso concludes in terms echoing the intention apparent in the outset. It first limits the top level of the water to be enjoyed by the defendant—to ensure which, a by-wash was to be made level with the apron of plaintiffs' mill ; and then adds that the bottom level of the said race-way (meaning the defendant's race-way), and not the bottom of the race in point of depth of excavation, but the bottom or lower end as distinguished from the top or upper end, shall be where the line between lots numbers twelve and thirteen crosses the Don, pointing out the lower termini of the defendant's race, so limited that it should embrace the fall of water from the plaintiffs' apron, or rather from the level of the plaintiffs' apron to such line. It is then added that the said race-way so to be cut, should in no wise occasion injury or inconvenience to the mills of plaintiffs by throwing back the water on their water-wheel or apron at any time whatsoever." The proviso seems to contain three distinct provisions. It declares that the license thereby granted should be and was limited (in such manner as)—1st : That the apron of the present grist mill, &c. of the plaintiffs, according to its present level, should form the top level of the privilege of water so intended to be granted to the defendant, to ensure which a by-wash should be made by the defendant, &c., thirty feet wide. 2nd : And (in such manner as) that the bottom level of such race-way should be where the line between lots No. 12 and 13 crosses the Don, so that it shall embrace the fall from their apron to the said line. 3rd : And (in such manner as) that this said race-way so to be cut and opened, should in no wise occasion injury or inconvenience to the mills of the plaintiffs, by throwing back the water on their water-wheel or apron, at any time whatsoever. It is of an infraction of this last clause that the plaintiffs complain.

The by-wash being mentioned as instrumental in producing the injurious effect against which this passage was designed to guard, it is attempted to distinguish between the race-way and the by-wash in this concluding sentence, but the former appears to be used in its most comprehensive sense as expressive of the whole privilege granted, and that its import is quite as strong as if the words "the license or permission hereby granted" had been substituted for "race-way," as a reproof of the whole would manifest. It is the race-way that is not to occasion backwater, and the by-wash would seem an essential part of or appurtenance to such race-way, tested by the enquiry whether it formed any part of the plaintiffs' race apart from the defendant's, and whether it could be removed without affecting the latter. It is called the race "to be cut"—or to be made. It might consist principally of excavation, but, doubtless, if embankment proved essential to the attainment of the authorized level it would be included. So of a by-wash—the whole forms the defendant's race-way, and that raceway is not to occasion injury or inconvenience to the plaintiffs. In this point of view I should incline to infer that if the whole case turned upon that part of the deed which relates to the by-wash, the defendant could not enjoy the easement granted, if in doing so (as by drawing off and damming up the water alternately) he became instrumental in causing a higher level of water than would otherwise have been attained. It would contravene the proviso. But the evidence goes further, and tends to shew that the by-wash and the ice upon and below it only produce the evil complained of, by reason of an obstruction placed in the defendants' race called a waste-gate, higher than the level of the by-wash, and which is equally instrumental with the ice in impeding the water and raising its level; and that if the head race and waste-gate, &c., of the defendant were not higher than the by-wash, the water obstructed in the plaintiffs' race would escape through the defendant's. The question then arises whether, according to the license, the defendant may flow back the water by works constructed by him in that part of his race which runs through his own land, if by any

accident it cannot, at whatever level he can raise it, escape over the by-wash and through the defendant's race. I think not. I think it incumbent on the defendant to relieve the plaintiffs of backwater—over the by-wash if practicable—if not, by some other contrivance; and it would seem no difficult matter to effect if the defendant is not to be indulged with a head of water higher than can be raised without exceeding the level of the plaintiffs' apron. The difficulty arises from his engrossing a head of water, incompatible with a level not higher than the apron of plaintiffs' tail race. I understand that when the by-wash is clogged with ice, the defendant, from the elevation of his works, is enabled to raise a head of water higher than he could if there was no such obstruction; and that when the free passage of the water at the present level is prevented across the by-wash, he does not, as he might, permit it to escape over his own dam and past his own mill; conceiving that if from any cause it cannot flow through the plaintiffs' race into the Don, he is not under any obligation to provide other facilities, nor prevented from acquiring whatever head can be obtained, so long as the by-wash itself remains unaltered, however backwater upon the plaintiffs' mill may be occasioned, and however contrary to the original intentions and expectations of the parties. The proviso seems to me to declare, that at all events, and at all times whatsoever, the plaintiffs are not to be subjected to injury or inconvenience from backwater by the race-way of the defendant. The evidence shews that such race-way (even if the by-wash composed no part of or appurtenance to it) has produced both injury and inconvenience to the mills of the plaintiffs, by throwing back the water on their water-wheel and apron at various times during several winters, which in my opinion was wrongful on the part of the defendant, and consequently that the verdict ought to stand. It follows, in my humble opinion—first, that there was proof that the defendant had raised the water higher than was authorised by the indenture; secondly, that the terms of the indenture are not necessarily complied with, so long as the by-wash does not exceed the limits therein pre-

scribed, whatever be the height of defendant's gate, although there appears no express stipulation touching the latter; thirdly, that the defendant is so far restricted or limited in the grant, as that no damage should accrue to the plaintiffs from the elements, although only indirectly occasioned by the defendant's enjoyment of the easement according to the expressed restriction of the grant, the same being guarded against in the conclusion of the proviso—and this, fourthly, notwithstanding that the grant must be construed most strongly against the plaintiffs; and lastly, that the action is properly conceived in case.

Note, on reading the above.—Might not the defendant legally remove the by-wash, if found to create the obstacle it was in its erection designed to prevent?

Per Cur.—Rule discharged.

POWERS & SCOTT v. RUTTAN, SHERIFF.

Where, in trespass against a sheriff for seizing the plaintiffs' goods, the defence was that they were the goods of a third party, and had been seized as such under an attachment issued against him as an absconding debtor, but had been delivered up at the time of seizure on the plaintiffs entering into a bond for their production when required, and afterwards they were sold at the suit of the attaching creditor on a writ of *fiery facias*, the plaintiffs having given them up according to the terms of their bond, and the plaintiffs now claimed them as their own property under an assignment from the absconding debtor prior to the attachment, which the defendant contended was fraudulent and void as against creditors, but proved no debt due to the attachment creditor, nor did he shew the judgment, nor execution, relying on the bond as estopping the plaintiffs from disputing those facts, and the jury under the direction of the judge found for the plaintiffs; the Court, although agreeing in the direction of the judge that the judgment and writ of execution should have been shewn, yet, from the circumstances of the case, and on affidavits filed shewing that the damages were excessive, granted a new trial on payment of costs.

Trespass for seizing and selling goods of plaintiffs. Plea, the general issue. It appeared in evidence that the property in dispute, consisting of the tools and apparatus of an iron-founder, with many articles of hardware goods, &c., had originally belonged to a firm of Merriman and Farrar; and that the same had been assigned to the plaintiffs verbally, in 1832, and delivered into their possession. The witness present (a brother of Farrar) could not specify the price attached to any particular article, but represented that they had been valued in detail, and the prices noted on a piece of paper, which (if so) was not produced at the trial.

He said the parties were two or three days engaged in the transfer. As to consideration, the witness said the plaintiffs were to pay the bank some debt of Merriman & Farrar, who also, it was said, owed the plaintiffs; but the amount of either he could not tell. He asserted that a regular delivery took place, and that soon or immediately after this, Merriman and Farrar absconded, and were regarded as fugitive debtors. It was proved that subsequently the plaintiffs had advanced monies for debts due by the fugitive, and had obtained the discharge of their endorser to the bank for about 500*l*. The plaintiffs' witness asserted a paid transfer and delivery for a valuable consideration; but it was obvious as a general fact, that the assignors were indebted at the time, and contemplated an immediate flight, to avoid some creditors, and may have desired to prefer others by the arrangement set up; and although the transfer may have been real and for a valuable consideration, it was extremely questionable whether it was *bona fide* as against creditors generally. It was clear that possession had been given to the plaintiffs, whatever the true motive of the transaction might have been; and there was no evidence to rebut (except presumptively from circumstances) the account given by the witness Farrar. The goods claimed in this action amounted to 350*l*. and upwards. The trespass complained of consisted of a sale of the same by a sheriff's officer, under the warrant hereafter mentioned, as belonging to Merriman & Farrar, under protest of the plaintiffs' claiming the goods as theirs. This warrant was produced and proved by the plaintiff. It further appeared in evidence, that on the 11th October, 1832, an attachment issued to the sheriff of Newcastle, at the suit of one David Brodie, against the estate, real and personal, of Merriman & Farrar, for 200*l*., which was received by the defendant on the 15th of that month. No warrant was produced authorizing the bailiff who made the seizure to levy the effects in question, but the plaintiff proved that, having seized them at Brodie's suit and taken them from the hand of the plaintiff into his possession, the plaintiff, on the 27th October aforesaid, executed a bond to the defendant, in 400*l*. penalty, the con-

dition of which (after reciting that the defendant had on that day, by virtue of a warrant of attachment out of the Court of King's Bench to him directed, at the suit of Brodie, against the estate of Merriman & Farrar, seized upon, as belonging to the latter, part of lot No. 28, 2nd concession, Cramahe, with the machinery which belonged to the furnaces) was, that if the plaintiffs should deliver or cause to be delivered to the defendant, or any person by him authorised for that purpose, at Cramahe, the said property that was mentioned in the inventory thereto annexed, whenever the same should be demanded, then such obligation should be void, otherwise of full force. The schedule annexed includes the chattels for which this action is brought; the whole being, on the 3rd March, 1834, appraised at 37*l.* 19*s.* 4½*d.* A sheriff's notice of sale, with the defendant's name at the bottom, in print, was produced, bearing date the 29th November, 1832, advertising for sale, on the 7th December following, at the furnace of the plaintiffs, in Cramahe, a large quantity of chattels, including the whole or the greater part of those attached at Brodie's suit, seized by virtue of a writ of *fi. fa.* to the defendant directed, at the suit of the plaintiffs, against the goods and chattels of Merriman & Farrar. And it was in evidence that this public notice had been put up at the instance of the plaintiffs; but no writ of *fi. fa.* or warrant was produced, and it was proved that no sale took place pursuant to such notice. At the time the goods were attached and bonded by the plaintiffs, they claimed them as their own, asserting their purchase from the fugitives, who had absconded a few days previously. They produced no bill of sale, or proof of title, beyond bare possession, but asserted that they had agreed to pay debts of the assignors—not, however, adopting all, or including any claim of Brodie's. In yielding up the property, they said there would be a lawsuit about it. The goods remained in the plaintiffs' hands until January, 1834, when a bailiff called for and received them under a warrant of the defendant, dated the 29th January, 1834, to such bailiff directed, by which, reciting that by virtue of a *fi. fa.* out of the Court of King's Bench, at the suit of Brodie, he was commanded

to make of the goods of Merriman & Farrar, 313*l.* 5*s.* 8*d.*, and interest. He (defendant) authorised and commanded the bailiff to cause to be made the aforesaid sum, so that he might have the money as commanded. No judgment or writ of *fi. fa* was produced at the trial, but the bailiff stated that under such warrant he went to seize the chattels in dispute; and that he seized and sold the principal part of those mentioned in the schedule to the bond; that he took the bond with him, and that he made no levy against the will of the plaintiffs, but that he demanded restoration of the goods in compliance with the condition, and was consequently allowed to remove them with the assent of one of the plaintiffs who was present, and actually assisted in the operation. The plaintiffs, however, said they should forbid the sale at the time of sale, and did so. The goods were removed a short distance from the plaintiffs' premises, and afterwards sold, as the bailiff said, under the warrant, as having been previously attached. The plaintiffs always said they meant to try titles—that, to be sure, the things would be sold, but that they would forbid it and contest the right. This sale constituted the trespass complained of.

For the defence it was contended—1st, That no trespass was proved, the goods having been taken or received from the plaintiffs with their assent, under their bond to the defendant. 2nd, That the evidence shews a fraudulent case as against creditors—verdict for plaintiff, and 347*l.* 9*s.* 4½*d.* damages.

This case was argued on the return of a rule obtained in Michaelmas term last by the Solicitor General for defendant, to set aside the verdict and grant a new trial—for misdirection, excessive damages and upon affidavits.

Boswell for the plaintiffs.

ROBINSON C. J.—Upon the report of this case which has been made by the learned judge, and upon the affidavits which have been filed, it seems very clear that great injustice would be done if no relief were afforded against this verdict; and certainly, from the complication of this case, it is not one in which the plaintiffs have any equitable claim to retain a compensation extravagantly disproportion-

tioned to the injury they complain of. So far from it, there is great reason to apprehend that the plaintiffs have lent themselves to a dishonest attempt of Farrar and Merriman, the absconding debtors, to place their property out of the reach of legal process ; and if by any want of diligence or care in conducting the defence, they had succeeded in obtaining a verdict to the value of the goods taken out of their possession, there would be occasion for regret, when the merits of their case seem so very doubtful ; but there is reason to fear that the verdict which has been given is for a sum nearly ten times greater than any injury they proved themselves to have received, and this being so, there is very naturally a strong inclination in the court not to suffer it to be final if relief can be afforded without any unjustifiable exercise of their discretion. I have no difficulty in agreeing with my brothers that a new trial may be granted on payment of costs ; and considering the errors or omissions of the defendant in conducting his defence, he has no reason to complain that he cannot obtain it on other terms.

The defendant, as sheriff, had, as we now learn, an execution against the goods of Merriman & Farrar, at the suit of one Brodie, and under it he seized and sold certain goods which had once been theirs, but which at the time that he took them were in the possession of the plaintiffs. The plaintiffs, having brought this action of trespass in consequence, the defendant seems to have relied on these two grounds of defence : 1st, That when he took the goods under the attachment at the suit of Brodie, as the goods of Merriman & Farrar, these plaintiffs executed a bond which has been produced, in which it is recited that the defendant having an attachment against the estate, real and personal, of Merriman & Farrar, had, by virtue of that attachment, seized upon these goods as belonging to the latter, and, without any assertion of a claim on the plaintiffs' part to the goods, or any denial of their being the goods of Merriman & Farrar, the plaintiffs bound themselves to deliver them up to the sheriff whenever they should be demanded ; that when the sheriff's officer did afterwards demand them for the purpose of selling them under the warrant, which was

produced at the trial, and which upon the face of it professes to have been made upon a writ of *fi. fa.*, issued in the case of Brodie v. Merriman & Farrar, they (Scott & Powers) gave the goods up, as they had bound themselves to do. By their bond, and by this voluntary delivery, the defendant maintained that they had negated the legality of the seizure, and disabled themselves from maintaining that any trespass had been committed upon them in respect to those goods. If that defence ought to have availed, the sheriff was in a situation to urge it at the trial without producing the *fi. fa.* under which he says he acted, and without proving any judgment upon which it issued. The learned judge, however, did not consider the giving the bond, and the subsequent delivery of the goods into the sheriff's hands, precluded the plaintiffs, if they were really the owners, from seeking an indemnity in this action for the wrongful sale of these goods as the property of others.

Then the second defence which the sheriff resorted to was, that the goods were not in fact the goods of the plaintiffs, but were, at the time of the seizure, the property of Merriman & Farrar; and to shew this he relied upon convincing the jury that the sale which the plaintiffs pretended had been made to them was a feigned and fraudulent transaction, not real and *bona fide*, but contrived merely to cover the goods from being seized by the creditors of Merriman & Farrar, and not intended between the parties to change the property. It appeared to the learned judge, that to entitle him to make this defence, he must shew that he was himself not a wrong-doer, and that for that purpose it was necessary he should prove that he had legal authority to seize the goods of Merriman & Farrar under an execution which had a judgment to support it. The defendant offered no such evidence; and in consequence the jury, in accordance with the opinion of the judge, gave a verdict for the appraised value of the goods at the time they were first attached.

It was shewn however, at the trial, that the goods sold for no more at the sheriff's sale than 60*l.* or 70*l.*; and it is now stated to us on affidavit, and not contradicted, that all

that was most valuable was bought in by friends of the plaintiffs, for their benefit, for a very small sum, and^r that they consequently retained possession of them. If this be so—and it is not contradicted—then Scott and Powers, by a transaction very suspicious in its appearance, to say the least of it, will be gainers to near the extent of 300*l.*, and this where the conduct of the sheriff has been neither violent nor wanton, but on the contrary such as his duty in my opinion justified, and indeed required. On the other side, it is said that the not producing the *fi. fa.* and the judgment was the voluntary omission of the defendant's counsel, and that the defendant must take the consequences of such neglect, whatever they may be; and as to the circumstances of the plaintiffs' having retained possession of the principal goods, paying a very small sum, it may be said truly, that if this was material to the question of damages, it might and ought to have been shewn at the trial, and no good reason why it was not has been offered. Undoubtedly there is weight in these considerations, but they ought not in my opinion to be decisive against granting a new trial in a case like this, which presents strong circumstances indicative of fraud, and which, besides, is peculiar in some of its features.

Speaking only for myself, I cannot say that I am surprised that the defendant should have committed the error in judgment which is ascribed to him, in omitting to bring proof of the execution and judgment. It certainly was imprudent in him to omit it, because it usually forms part of a defendant's evidence in cases of this kind; and if his counsel were aware of the recent decision of this court in the case of *Grant v. McLean* (in which, however, I had the misfortune to differ from my brothers), he could scarcely have felt it safe to dispense with such evidence, if he meant to impeach the pretended sale upon any ground, however strong. But I am not surprised, I say, that the defendant's counsel should have thought himself safe in resting upon his objection to the plaintiffs' case. I think, looking on the bond and inventory annexed, there might well appear to be ground for contending that they recognized the goods to be

legally seized by the attachment, and estopped the party from setting up a claim of which he gave no intimation in those writings. If we are right—as I think we are—in considering that under the circumstances the plaintiffs were not estopped, still I can readily believe that it appeared otherwise to the defendant's counsel; and it does not surprise me that he should have relied upon it as he did, and should have imagined it unnecessary to go into other matter of defence, either for disproving the cause of action or for mitigating damages. It is to be considered, that though the execution was not produced, the attachment was not merely admitted by the plaintiffs' bond, but was in fact proved; and if the jury could be satisfied that the goods were legally attached in the hands of Merriman & Farrar, notwithstanding the assertion of the previous sale to Scott & Powers, of course no subsequent disposal of them could be any trespass against the rights they claimed to have acquired during that sale; and at the time, they claimed only as the purchasers upon that occasion, pretending no other right. Still the defendant's case may be open to the objection, that no proof of a debt was given to support the attachment.

I do still so fully adhere to the opinion expressed by me in *Grant v. McLean*, and take a view so different from that which I understand my brothers to entertain of the intent, effect and construction of the statute of 13 and 27 Elizabeth, against fraudulent conveyances, that I am not prepared to say that proof of a debt due to Brodie was of course necessary for enabling the sheriff to dispute the right of Scott & Powers to recover as vendees of their goods under a pretended sale from Merriman & Farrar. If the evidence were such as to satisfy the jury that Merriman & Farrar were the owners of these goods before the attachment issued, and that being indebted, as they were proved to be, to several persons and in large amounts, they resolved to abscond and did abscond, but previously contrived with Scott & Powers to place these goods in their possession under a merely colorable transfer, but in reality for the benefit of themselves, and without any intention that the

property should in fact be changed, and that the formal delivery which took place was merely to deceive the world—if, I say, the jury could warrantably draw this inference from the evidence, then it is my impression that they could and ought to have said upon their oaths that the goods which had once belonged to the absconding debtors were still theirs, and consequently that it was no trespass against the plaintiff to seize them upon Brodie's attachment, whether Brodie could ultimately succeed in establishing a debt against Farrar or not, and this although on the trial no proof were given of a judgment or execution in favor of Brodie. I do not now enlarge on this point, because I do not make it the ground of my judgment—I only advert to it that the opinion which I entertain on it may not be mistaken. Circumstanced as this case is, I unite with my brothers in granting the new trial, on the grounds and on the terms I have before mentioned; for while we retain our present opinions, we could not agree in granting relief on more favorable terms.

SHERWOOD J.—concurred in granting a new trial upon payment of costs.

MACAULAY J.—It appeared to me at the trial that the defence was not sustained, treating the plaintiffs as fraudulent assignees under the statute 13 Elizabeth, chapter 5, there being no proof that Brodie was a creditor by the production of the judgment; and if he was, that no right to seize and sell was shewn in the absence of any writ of *fi. fa.* And that even if relation could be had to the attachment, there was no proof of a debt due either by production of the affidavit filed or otherwise; that property, or possession and right of possession, draw to the owner a constructive possession sufficient to maintain trespass; that the sale of the goods amounted to a trespass and conversion, and that as the plaintiffs shewed a *prima facie* right of property and of possession binding as between them and the fugitive debtor, however fraudulent and void as against creditors, they seemed entitled to recover from the defendant, who in the act of sale appeared a mere wrong doer. It was also contended that the bond estopped the plaintiffs from

denying the validity of the seizure under the attachment, or that the goods belonged to Merriman & Farrar, a fact assumed and admitted under their seals. To this construction I did not accede. I told the jury there had clearly been a change of possession and evidence of a sale—evidence of possession and right of property; that as between the plaintiffs and Merriman & Farrar, the question would be, whether there had been a sale binding *inter partes* or a mere *depositum* with the plaintiffs as bailees or agents. If the former, the property would be changed—if the latter, not so. But that in either event the plaintiffs were in possession with the assent of the former owners, and that the defendant shewed no right to sell—no execution being produced. That no such right could be inferred from the bond which preceded it, an which as and estoppel only concluded the plaintiffs from denying that the original seizure was under the attachment, though no warrant was produced; and that it did not compromise them upon the question of title in the property. That as the plaintiffs shewed a *prima facie* right as assignees or bailees, which the defendant had not rebutted or defeated, they seemed to me entitled to recover the value of the articles sold.

The alleged misdirection was rested upon the ground that the bond concluded the plaintiffs. Upon this point I still think that the bond, under the circumstances, cannot be admitted to affect the question of title. It was given under a pressure partaking of the character of duress, and does not declare whose the property was, but upon what authority taken, and whose the defendant asserted it to be. 7 Taunt. 1494; Ea. 12; 6 T. R. 293; 8 Moore 451; 1 Bing. 401; 1 C. & P. 28; 2 D. & R. 539; 2 B. & C. 821; Cowp. 414; 7 Bing. 153; 6 B. C. 696.

The plaintiffs were not restricted in the amount of damage by the price obtained by the defendant upon the sale; but the affidavits shew that the loss of the plaintiffs was by no means equal to the verdict rendered. Why this evidence was not produced at the trial is unexplained; but combined with the nature of the transaction and the features of the case throughout, I feel strongly disposed to concur in a new

trial upon payment of costs.—Vide 5 Burr. 2631 ; W. B. Rep. 701.

As respects the statute 13 Elizabeth, chapter 5, my general views applicable to cases like the present are given, in my opinion, in *Grant v. McLean*; and although under the evidence in that case I did not think it remained equivocal, or could be made a question with the jury whether a change of property had taken place or not as between Grant and his assignor Lowrie, yet I distinctly recognized the principle that it might, under other less forcible and conclusive circumstances, form a question whether the transaction amounted to a transfer or merely a deposit. And in this case, considering the loose, vague and unsatisfactory nature of the alleged arrangement as in evidence, combined with the facts that the assignors were indebted—contemplated flight, and immediately absconded, &c., I conceive that if the defendant had, by the production of a *fi. fa.*, shewn a right to sell the effects of the fugitives, it might then with propriety have been left to the jury at the trial to say whether a sale absolute *inter partes* was contemplated and effected, or whether the transaction amounted to more than a colorable transfer, not real or intended, but a mere bailment in point of fact to cover the goods. In the latter event, he would have stood justified without proving a judgment, having shewn the property in point of law to belong to the defendants in the writ, and not the plaintiffs, though in their naked possession. It would have been, of course, for the jury to say what was the nature of the arrangement; and in the absence of any proof that Brodie was a creditor, the verdict would be for or against the defendant accordingly as they found the right of property to be changed as well as the possession, or the possession only changed without affecting the right of property. To treat the case under the statute, a change of property *prima facie* must have been assumed, and the assignment sought to be vacated in the particular instance as fraudulent against creditors, and so void as against the plaintiff in the writ; but to have done that the plaintiff must have shewn by the judgment that such plaintiff was a creditor.

It has been suggested by his lordship the Chief Justice, that the question of property might have been raised upon the original seizure under the attachment, which was produced, and that if the jury had negatived the alleged transfer to the plaintiff, that seizure would have been justified; further, that in such event the plaintiffs' right would have been reduced to a mere possession, which possession would then appear to have been lawfully divested, and that the subsequent sale under an alleged *fi. fa.* could have been no wrong to them, but only a wrong to the owner. That at the time of such sale the plaintiffs would have had no possession, having been deprived of it rightfully under the attachment; that if the sale was wrongful, and a trespass against the real owner, no one but the owner could recover; and that to do so, such owner must have proved property and right of possession, drawing to him a sufficient possession to maintain the action; that had the sheriff proceeded to sell under the attachment, though unjustifiably as against the true owner, he could not be liable to the plaintiffs, if he proved that the goods belonged to the defendant in the attachment, and that the plaintiffs had no right beyond possession as bailees or agents, of which possession they had been lawfully deprived by the writ; that at the time of such sale, they would not have had a right of possession, nor perhaps would even the owner; and that the sale as it occurred should be regarded in the same light—with this difference, however, that the owner might in the latter case have maintained trespass by reason of the sale being made upon an alleged right apart from the attachment, but not proved—imparting to the owner, *quoad* such wrongful act, a right of possession, as amounting to an abandonment of the lien or right of possession acquired under the attachment; yet, that the present plaintiffs could not claim any such resulting right of possession, the wrong not being done to the possession, and the sheriff being only answerable to the real owner for the wrong done to the right of property itself. Still a further question occurs—namely, had the attachment been quashed or set aside, or the debt been satisfied, or the goods been wrongfully disposed of

under a separate authority, as asserted, though not proved, or without any authority—whether in any such event the right of possession which the plaintiffs had at the time of the seizure, would not result and amount to such a qualified interest or property as to enable them to maintain trespass for the wrongful conversion of the effects?

Assuming the goods to have belonged to the fugitives, yet it is clear the plaintiffs, at the time of the seizure, were the bailees thereof, with their assent, and as such, not only in possession, but entitled to the possession against all the world, except a lawful authority under or against them or the owners.—8 Co. 146; Yel. 96; 1 Bur. 20; 1 T. R. 475; 1 T. R. 12; Bul. N. P. 31; Bl. Rep. 1218; 3 T. R. 292; 4 T. R. 489; 7 T. R. 9; 5 Taun. 195; 1 Mar. 17; 11 Ea. 400. Then in that point of view, the original caption by the defendant under the attachment, would be lawful, but the subsequent tortious sale would make him a trespasser; and as to all tortious acts, the plaintiffs had title enough to sustain trespass. Suppose that to the present declaration the defendant had pleaded a special justification under the attachment, as the goods of Merriman & Farrar; that the plaintiffs had admitted it but new-assigned; that they were bailees; that the goods were taken out of their possession; and that the defendant made afterwards a wrongful sale of the property; would not that have defeated the justification and left the declaration unanswered? The defendant could not deny either allegation, and adopting both, I apprehend their right of action would be sustained. The subsequent wrongful sale would make the defendant a trespasser *ab initio*; and whenever the original caption could be no longer justified, the plaintiff's right of action, though rested merely on a right of possession (without any higher title), would be sustained. At all events, this view was not suggested or considered at the trial, and I do not feel that it would operate conclusively in favor of the defendant. At the same time, however, upon the merits generally, I assent to a new trial upon payment of costs.

Per Cur.—Rule absolute for new trial upon payment of costs.

MCKINNON V. BURROWS.

In an action for breach of covenant for good title, no damages can be recovered for improvements or the increased value of the land, the purchase money and interest forming the measure of damages.

The facts of this case and the judgment of the court thereon are reprinted in Trinity Term last. Since then, the plaintiff entered up judgment for 143*l.* and his costs, and took out execution; and last term *Kirkpatrick*, for the defendant, applied for an order restraining the plaintiff from proceeding upon his execution until he should restore to the defendant the possession of the premises which he still enjoys, and always has enjoyed undisturbed. It was contended that he ought to do this before he could recover back his purchase money with interest. Boulton (James) shewed cause, and contended that the defendant could not in law be restrained from availing himself of his verdict in the action of covenant by imposing such a condition upon him; and moreover, that it would not be equitable in this case even if it were legal, because by such a course he would lose the value of the improvements which he had made, and the defendant would get back his land greatly improved in value at the plaintiff's expence. *Kirkpatrick* replied, that the advantage of occupying the premises has fully compensated the plaintiff for the cost of the improvements, and that there is no reason why he should be allowed to recover back his purchase money and retain the land.

ROBINSON, C. J.—No authority was advanced on the part of the defendant to support the application which he has made, and though it may seem quite reasonable in principle that the vendee under such circumstances as the present should not be allowed to recover back the purchase money until he has given up possession of the land, I cannot find that the court have ever interposed to prevent it by making such an order as the defendant desires. The plaintiff, after a trial in this cause, has obtained a verdict and judgment for 143*l.* Why should he not have judgment as a matter of course. There is no ground for alleging fraud or bad faith in his proceeding; if there were, we shall certainly not want authority for interposing. But we are

asked, I think, to make a precedent of interposing upon a ground altogether new ; and I do not see that we can properly do so. It is possible that, considering that there had been no eviction, the jury, upon the facts proved, would have been warranted in giving damages small in amount, and perhaps even merely nominal, rather than awarding to the plaintiff the full amount of the money paid by him with interest. If greater damages were given than were just under the circumstances, that would have been a ground to move for a new trial within the proper period, but this court has no power to say that the plaintiff shall accept any less amount, or that he shall not receive anything till he has complied with a certain condition. I consider that upon a covenant for title, the vendee can bring his action, though there has been no eviction, and although he may not have sustained any specific pecuniary damage ; and however reasonable it may be for a jury merely to give nominal damages in a case of that kind, I cannot say that they are limited to nominal damages. The case of *Salmon v. Bradshaw*, Cro. Jac. 300, 9 Co. 60 ; *Cro. Jac.* 369, are material on this point ; also *King v. Jones*, 5 Taun. 426, and *Kingdom v. Nottle*, 1 M. & S. 364.

In this case, the jury seem to have given the verdict which they did upon the principle that the defect was fatal to the title, and that the contract should therefore be rescinded ; and as they have made the vendor return the purchase money and interest, it should seem to follow that the defendant ought to regain possession of the estate. But nevertheless, there may be considerations not yet opened to us which would make the equity of this consequence questionable. If there be none such, I do not see why the vendor should not, if he shall be driven to it, bring his ejectment, and rely upon the effect of the verdict as rescinding the contract, and entitling him to stand upon his former title, and precluding the vendee from setting up the conveyance to himself in bar of the vendor's recovery. However this may be, I am of opinion that we should not interfere in the manner desired, and that this rule should be discharged.

SHERWOOD J. concurred.

MACAULAY J.—The objection now urged should have been made at *Nisi Prius* in reduction of damages; but a verdict for the amount recovered was then taken without exception on this head, subject only to a question respecting the plaintiff's right to recover for ameliorations. The plaintiff having obtained a regular judgment, I do not think this court can impose restrictions upon him in its recovery at this stage of the proceedings. At the same time, when the plaintiff's case rests merely upon a naked breach of covenant for title, without eviction, and without his having been put to or sustained any actual damage beyond that of holding the estate under an imperfect title, I am much disposed to think the damages to be recovered should be but nominal. The jury are to assess damages upon the evidence, and an eviction or a sum expended in curing the title, or the loss of a contemplated sale, or the like, would shew a substantial injury; but if the plaintiff could shew no disturbance or actual loss or outlay, this action would seem premature. He should wait until the *ultimate* damage accrued, or restore or abandon the possession to the defendant, and so far rescind or abandon the purchase. The covenant for quiet enjoyment would form his proper protection in case of eviction, and damages ought not to be given under a covenant for title before eviction, as if it had taken place merely because it may eventually happen. It might never take place, and the plaintiff's right become absolute from lapse of time, and no such damage could at any rate have been experienced at the time of action brought. And since damages under the covenant for title may have accrued in various ways, without an eviction or a total loss of the estate or rescission of the purchase, the defendant's conveyance would still subsist, and estop him from claiming in ejectment against his vendee, although he may have been visited by an action for breach of covenant for title. It follows, that with me it is doubtful how far the plaintiff should, under the evidence in this case, have recovered so much as he did, namely, the purchase money; but the exception was not taken at the time, nor did it then occur to myself, or I should have suggested it. I, however, express

no conclusive opinion at present; and will only further remark that it may be found that covenants for seisin in fee and right to convey, may frequently be authorized, though the covenantor was seised only by wrong, such covenant not necessarily importing a seisure in fee by a rightful title; a wrongful one, while it subsists, would impart the estate, which might eventually become final and conclusive upon the right—become in short a rightful estate. A more special covenant, as for a sure, perfect and indefeasible estate, &c., may not be kept by shewing a wrongful or imperfect or defeasible right; but when it becomes a question in such cases what damages are to be given, I apprehend their amount will materially depend upon whether an eviction or disturbance have been experienced by the covenantee or not—whether in fact he has absolutely lost or retained the estate—or whether he has been otherwise (and if so, how otherwise) damnified.—F. N. B. 134, Hob. 22, 4 Leon. 250, 4 M. & S. 188; 1 Mar. 107; Co. Lit. 365; Roscoe on Real Act, 142.

Per Cur.—Rule discharged.

RIDOUT, ONE, &C. v. BROWN.

In an action by an attorney for his fees, he must prove the delivery of his bill, although the defendant has suffered judgment by default.

Assumpsit for services as an attorney in and about the prosecuting and defending divers actions, &c., specifying no particular action,—the defendant suffered judgment to go by default. At the assizes, the plaintiff, to prove damages, produced a bill of costs, in a suit in which Brown was defendant, and proved by a clerk that Brown had retained him. With the bill of costs there was an affidavit of a witness proving that a copy of this bill had been delivered to the defendant as required by 2nd George II. ch. 23, sec. 23, a month before action brought. The Chief Justice refused to admit this affidavit at *nisi prius*—there being no consent of parties to dispense with *viva voce* evidence of the fact. The Chief Justice being of opinion that as this evidence was insufficient and no other was offered, and that even on an assessment of damages the delivery of a bill

must be proved, reserved the question whether for want of such proof more than nominal damages could be allowed. The plaintiff relied confidently on the opinion he had formed, that evidence of delivery of a bill is unnecessary after judgment by default, and in Michaelmas term last the question was argued by *Ridout*.

ROBINSON, C. J.—It is to be regretted that difficulty has arisen in this case, for the amount is small, and I have no doubt is justly due; and besides, though it was not legally proved, the statute had been in fact complied with. The point is one of some importance to be settled. After the fullest investigation of the question in my power to make, I think the evidence was necessary.

In England, after judgment by default, the damages are in general assessed before the sheriff; and not many cases are to be met with where it has been agitated in banc what evidence it is necessary to give upon inquiries. Nor are the treatises on practice and evidence by any means full upon that subject. The plaintiff thought the decisions which have taken place on the Statute of Frauds were applicable, and indeed that they determined the question; but I think the difference is very clear. The sixth section of the Statute of Frauds requires certain agreements, which in their nature are special and particular, to be made in writing; and declares that no action shall be brought to charge a person thereon unless the agreement be in writing. Since this statute, it has not been held necessary to declare in other terms than before. It is ruled that the plaintiff, in setting out his agreement, may simply aver that the defendant agreed, &c., without stating that he agreed in writing, since the statute had a view to the evidence only, and not to the pleadings. Then it has undoubtedly been decided that, when to a declaration so framed the defendant makes no defence, but suffers judgment by default, it is not necessary, in assessing damages, to prove an agreement in writing, as it of course would have been if the agreement had been denied. This is rational, certainly, because the defendant, having admitted that he agreed to do a certain specific act, dispenses with proof of the manner

in which he agreed, and is held to have acknowledged that he did agree in an effectual, binding manner. The particular cause of action is stated, though not the mode of proof. The cause of action is admitted. The jury, therefore, require no proof, and the mode of proof becomes immaterial. By the statute now under consideration, it is enacted that no attorney shall *commence* or *maintain* any action or suit for the recovery of fees, &c., till the expiration of one month or more after he shall have delivered or left for him a bill of such fees, &c. The plaintiff here declares generally for services rendered as an attorney in divers suits. By pleading over (or by not answering), the defendant admits only what the plaintiff has stated in his declaration; that is, he admits that he is indebted to the plaintiff for fees, &c., in various actions.—2 Sand. 180 c. But what then? Surely this does not enable the plaintiff to recover on whatever bill he chooses to produce in court. He must prove a retainer in the particular case, as he must prove the sale and delivery of specific goods upon an assessment of damages on a general count for goods sold and delivered; and so also if he has any bills for which he is not in a situation to maintain an action, he cannot include those in assessing his damages. The statute requires a bill to be delivered for two reasons—first, that defendant may know what amount is claimed of him, which he cannot tell till he is informed; and, secondly, that he may have the bill taxed if he doubts its accuracy, before he can be put to costs for not paying it. When a defendant makes no defence, there seems to be the same reason why he should have these advantages, as when he denies the demand totally; because otherwise he may have meant only to submit to a recovery of costs in a case in which a bill has been delivered to him, and which he would therefore be dishonest in resisting; and if upon the inquiry, the plaintiff is allowed to include other bills which he never has delivered, injustice is done, and the defendant loses the benefit of the statute for no good reason. The course of decisions upon the Statute of Limitations cannot govern this question. There the enactment is, that all actions of debt, &c., shall be brought within six

years next after the cause of such suit; and it is well settled that it is no part of the plaintiff's case to prove his cause of action accrued within six years, nor is it any objection that it appears on the record that the demand is of older date. It may not be very easy to account satisfactorily for the different effect given to this statute, and to many others which require actions to be brought within a certain time for penalties, unless we attribute some weight to the consideration that the courts always leaned in favour of the plaintiff, thinking it hard for him to lose his just debt after six years, and therefore refused to allow the defence of the statute unless when it is pleaded. There is this distinction, however, that in penal actions it is the suing that first vests the interest in the subject matter in the informer; whereas in the case of an ordinary debt, there has been a perfect cause of action once subsisting, and the lapse of six years only bars the remedy. The cause of action is complete without proving any more than the debt, though the remedy for it is liable to be defeated by setting up the statute. And besides, it has been observed that the lapse of six years does not necessarily extinguish the remedy: there are many exceptions, as from infancy, absence, &c.; and it will not be presumed that the remedy is lost, till the objection is taken and the plaintiff has an opportunity to answer it.

In the case of an attorney's bill, however, there is absolutely no right of action till a month after the delivery of the bill. The delivery of the bill is therefore part of the cause of action, and a necessary agreement in the plaintiff's case. It is clear that the courts have never considered that the Statute of Limitations, and this statute respecting attornies' bills, stood upon the same footing as regards the evidence at the trial; because it has been again and again decided that upon the general issue, the plaintiff must prove the delivery of a bill; whereas upon the general issue the defendant cannot object the Statute of Limitations. The only authorities I am aware of which seem to throw any light upon this particular question, I mean which refer expressly to the statute 2 George II. chapter 23, are the two cases of

William v. Frith and Hooper v. Full, Doug. 188-9, from which I infer, though it is not necessarily stated, that bills were delivered, and were shewn to have been so upon the execution of writs of inquiry. In Brooks v. Mason, 2 H. Bl. 290, upon a trial of an action for an attorney's bill, the defendant had been served with a copy of the bill and admitted it to be just, and promised to pay it; but because the bill was not left with him in consequence of his saying he knew not what to do with it, the plaintiff was nonsuited, and it was held that the nonsuit was proper. In principle, I think this case much in point, because the specific account was acknowledged; and yet it was held that the plaintiff must shew that he had strictly complied with the statute. The judgment by default could but be an acknowledgment of the demand, even if it had been specifically stated in the declaration, and the necessity of shewing the statute complied with would seem to be as strong as it could be after an express admission. In Welland v. Rock, Barnes, 242, the very point now in question seems to be determined; for it was held not merely to be irregular, but absolutely illegal to assess damages in an action where a bill had not been delivered, and the assessment was set aside. The case is shortly stated and may not be accurate, though Mr. Hullock, in his treatise on costs, treats it as authority. If the judgment by default was an admission of the delivery of the bill, of course the delivery could not afterwards be denied, and the assessment set aside on such a ground. It is quite clear that upon the general issue the plaintiff must have proved a bill delivered, or he must have been nonsuited. Then the only question can be, whether the defendant, by not pleading to the declaration, can be taken to have admitted any fact not stated in it. I do not see on what principle he can be, and I therefore continue of the opinion that the evidence was necessary at *Nisi Prius*.

SHERWOOD, J. of the same opinion.

MACAULAY, J.—The act of 2 George II. chapter 23, section 23, provides that no attorney shall *commence* or *maintain* any action or suit for the recovery of any fees, &c. until the expiration of one month or more after he shall

have delivered a copy of the bill, &c. It is manifest that under the general issue, it is incumbent on the plaintiff to prove a compliance with the statute before giving evidence of any bill within its purview, and a similar course may not unreasonably be required upon assessments, when from the nature of the declaration the default admits no liability in the particular subject-matter, but only a general liability for some fees due for some undefined services in some unnamed suits. Whenever it is essential for the plaintiff to go into evidence to prove a retainer and services in any particular suit—in other words, when the bill sought to be recovered does not appear upon the record, but is first brought under the notice of the court at *Nisi Prius*, the statute would seem sufficiently positive to entitle the defendant to call for proof of a compliance with its terms in the particular instance. When a retainer and services in one or more specific suits are averred in the declaration, the judgment by *nil dicit* by admitting those allegations, would supersede the necessity of proving a service of the bill, because upon the record it would stand conclusively admitted that the defendant owed the plaintiff in such suits. The amount only would remain in question; and it is only when proof of a retainer and of the services is required, *dehors* the record that the service of bills must be proved as a preliminary step. When the liability is admitted on the record, the statute is dispensed with, and the defendant is concluded. The plaintiff takes up the case where the admissions end, and proceeds to prove the residue. He need not go back to the beginning of his case; such a course would leave an hiatus in the evidence at the trial supplied by the record. The plaintiff would prove the service of a bill and the amount, and refer to the record to shew the admission of a retainer and services rendered. This I think inconsistent; for though he should fail to prove service of the bill, it would still stand confessed upon the record that the defendant owed him upon a retainer and services in the suit or suits particularized. It is only when the onus of proving the whole case is on the plaintiff, that the first step of a compliance with the statute is incumbent.

Now in the present case, as the record shews nothing specific, the plaintiff is obliged to prove a retainer and services in whatever suits he seeks to recover for—that is, although it is an assessment, the general nature of the declaration imposes upon him the burthen of proving his whole case *prima facie*, in support of whatever bills of costs he claims against the defendant. The record supports no part of any particular suit or bill. Under such circumstances, it is within the terms and spirit of the act to exact proof of a month's service, previous to the action, of any bill sought to be recovered. Without that observance the action ought not to have been commenced, and the statute declares that it shall not be maintained.—1 Saund. 276, 2 Salk 510, 4 E. 400, 1 B. & A. 368, 268, Cro. Jac. 220, Yel. 151, 3 Camp. 40, 2 Camp. 441, 5 Esp. 19, Str. 612, 9 Ea. 325, 1 B. & P. 263, 2 Saund. 107, Doug. 316, 2 Wils. 372, 3 Wils. 61, 1 H. Bl. 262, 629, 542, 4 T. R. 275, 448, 4. Taunt 148, 1 Chit. R. 621, Doug. 198, 3 Sal. 50, T. Ray. 245, Carth. 57, 147, 3 Sal. 19, 1 Sal. 26, Alleyn 4, Comb. 126, Barnes 28, 1 Show. 96, Bull N. P. 145.

Per Cur.—Damages restricted to one shilling.

DOE EX DEM. BOUTER V. FRAZER ET AL.

Where the defendant, who went into possession under the lessor of the plaintiff, afterwards refused to acknowledge his right: Held, that he was entitled to neither a notice to quit nor a demand of possession.

Ejectment for lands in Ameliasburg, described as lying in the fifth concession from the bay, and third concession from the lake in that township. At the trial at the last assizes for the Midland district, the plaintiff, by a chain of conveyances, which he proved deduced title from one Eberts, the original grantee of the crown; and, moreover, proved that the defendants, speaking of the lands, said they had bought them of the lessor of the plaintiff,—and there rested his case. The defendant moved for a nonsuit, on the ground that a notice to quit, or at least a demand of possession, should have been proved. The Chief Justice, who tried the cause, overruled the objection, seeing nothing in the evidence that rendered a notice or demand necessary.

In the discussion on this motion, the defendant's counsel spoke of the defence intended to be advanced as if it had been proved, evidently grounding the notice for nonsuit in some degree upon it. This intimation of the intended defence, induced the plaintiff's counsel, with permission of the court, to call another witness before the defence was proceeded in, for the purpose of proving that the defendants went into possession of the premises seven years ago, upon a contract made with the lessor of the plaintiff for the purchase of them ; that they were to pay in four years for the lands, and had continued ever since in possession of them ; which evidence seemed to the Chief Justice to have been adduced in order to shew that the defendants were estopped from disputing the title set up for the lessor of the plaintiff.

The defendant, upon the plaintiff then closing his case, opened his defence to the jury, in which he stated that the defendants had agreed to buy these lands of Bouter as had already been stated, but having discovered afterwards that the lands intended to be granted to Eberts, under the supposition that they formed a part of Ameliasburgh, were in fact part of the adjoining township of Sophiasburgh, and under that designation were still vested in the crown ; and believing from this error that Bouter could never give them a perfect title for the lands, upon which they had erected valuable buildings, they declined to fulfil their contract with him, and desired to maintain possession, in the hope that they might acquire a title from the government. It was objected that the defendants, having gone into possession upon a contract with Bouter, could not deny his title. Under the circumstances, the Chief Justice held that they could, since it would appear hard indeed if a purchaser discovering, after he had made extensive improvements, that the vendor could not make him a legal title, should be estopped from protecting himself by treating with any other person who could. The defendants were therefore allowed to go into their case ; but the evidence they offered being wholly unsatisfactory and inconclusive in respect to the alleged error in the grant made by the crown to Eberts, the Chief Justice directed the jury to find for the plaintiff.

In Michaelmas term last *Washburn* obtained a rule *Nisi* for a new trial on payment of costs, or for a nonsuit on the ground of want of notice.

ROBINSON, C. J.—Independent of the question about the necessity for a demand of possession, I am inclined to think that the plaintiff should have been allowed to recover at all events, and that the defendants should have restored to him the possession they received from him before they could advance any new title in opposition to his. Whether the lessor of the plaintiff should have demanded possession before bringing the action remains to be considered, and that involves the question whether in August 1830, the time of the demise laid, the defendants were trespassers. It does not appear expressly stated in my notes of the evidence that, at any time antecedent to the demise laid, the defendants had refused to make their payments on the ground that Bouter had no title, but it is admitted now before us, and the fact no doubt was so, that the necessity of this ejectment arose from the defendants having declined to make any payments under their agreement, upon the very ground that the lessor of the plaintiff had no title, and that the defendants were endeavoring to purchase from the government. After this declaration, the lessor of the plaintiff was entitled to treat the defendants as trespassers, and to bring his action without demanding possession. And indeed, the course of defence taken at the trial dispensed with the necessity of proving any such demand. I am therefore of opinion that the *postea* should be awarded to the plaintiff.

SHERWOOD, J.—Of the same opinion.

MACAULAY, J.—The cases shew that the defendants, having disclaimed holding under the lessor of the plaintiff, and set up an adverse right impugning his title, he was at liberty to treat them as trespassers in an ejectment, without a previous notice or demand of possession; and the defence not being supported by sufficient evidence in other respects, the verdict is consequently right.—3 T. R. 13; 6 T. R. 298; 1 Star. 72; 1 Camp. 473; 2 M. & P. 545; Bull. N. P. 96; Peake, N. P. C. 196; Cowp. 622; 10 Ea. 13; 1 Star. 308; 3 Camp. 8; 6 Taunt. 208; 3 Wils. 25.

Per Cur.—*Postea* to the plaintiff.

REX V. HIGGINS.

A prisoner charged with murder may in some cases be admitted to bail, and on application for bail, the court may look into the information, and if they find good ground for a charge of felony, may remedy a defect in the commitment by charging a felony in it.

The prisoner was committed on a charge of having beaten and wounded Patrick Burns on the 8th day of October last, of which beating and wounding the said Patrick Burns died. The commitment did not charge him with felony, nor were the terms *wilful* and *malicious* attached to the charge. He applied to a judge in vacation to be bailed, who, under all the circumstances, thought it better the application should be made to the court in term, which was done accordingly.

ROBINSON, C. J.—We are of opinion that the prisoner may properly be admitted to bail; his recognizance to be taken by two of the aldermen of the city in the sum of 1000*l.* and from sureties in 250*l.* each. Twenty-four hours' notice of bail to be given to the Attorney General.

Although the magistrate has not charged the prisoner with felony, nor attached the terms *wilful* and *malicious* to the charge, yet he is not to be admitted to bail on that account; for it is proper in such case for the court to look into the informations, and if they find good ground for a charge of felony, they may supply the defect in the commitment. The learned judge, therefore, to whom the application was made in vacation, finding it not to be a case in which the prisoner could claim to be bailed of right upon any legal ground, and finding that the evidence was such as might induce a doubt in regard to the proper exercise of the discretion which is vested in the judge, thought it better to leave the application for the consideration of the court. It appears certain that the deceased came to his death by violent injuries inflicted by some one, and the case is such as excludes the probability of the injury being accidental; and therefore it is proper that whatever is done on such a charge, should be done on the most grave consideration. We abstain purposely from discussing minutely either the law or the facts of the case, for obvious reasons: it is fit it should come without preju-

dice before the proper tribunal, at the proper time. It has been necessary for us, however, to look into the evidence carefully; and having done so, it is enough to state, in general terms, that it is not conclusive as to the fact of the wounds which occasioned death being inflicted by the prisoner. From the statements of some of the witnesses, it might be inferred that the prisoner struck the blow which was fatal—the statements of others lead to a different conclusion. It will be for a jury to determine on which side the evidence preponderates. In the mean time, the doubt as to that point is one principal consideration to be attended to in granting or refusing bail.

Secondly, If the case were clear upon the testimony upon that point, then the question arises, whether, under the circumstances described, the homicide would be murder, manslaughter or justifiable homicide—I mean as being in advancement of justice, or in self-defence. Upon this point, the magistrate who received the evidence has forborne to state any conclusion in the warrant. It is not necessary for us to express any opinion: we give merely the following prominent features of the case, which, upon the testimony, there seems no room for questioning.

It is not shewn that the prisoner entertained any previous malice against the deceased; nor is anything shewn, from which such a feeling could be accounted for. It is proved that the prisoner was a peace officer, at the head of the constables of the city, and acting with a number of them, openly and avowedly, as peace officers, at the time of the fatal occurrence: that riots had recently occurred in the city, during an election, which was still going on; and that the apprehension of some serious breach of the peace had occasioned the prisoner and several other constables to assemble at the police-office on that evening, in order to be at hand if their services should be necessary: that the prisoner and other constables were suddenly called out by information of a reported disturbance which they were solicited to quell; that they went out upon this information and met casually with the deceased as one of a party of twelve or more persons, a portion of whom had clubs, and

whose conduct at and just before the time of meeting is differently described by the several witnesses—some declaring it to be noisy and turbulent, and others harmless and not calculated to create alarm ; that among those who had sticks was the deceased, that he was not sober, that he had just before been turbulent in his conduct, and had used threats of violence (not in the hearing of the prisoner) nor directed against any one in particular ; that the evidence of the many witnesses who were on the spot is contradictory as to what took place when the prisoner and the deceased met ; that, if some of the witnesses are to be believed, the prisoner announced to the deceased the purpose for which he came, and commanded him to keep the peace, before any force was used. The deceased, according to these witnesses, used contemptuous expressions towards the peace-officers, and first assaulted the prisoner with his stick, striking blows at him, which for all that appears might have endangered his life, and rendered any force justifiable on the part of the prisoner in defence of his life, independently of the special character in which he stood as a peace-officer, and the protection due to it on public grounds. Upon this part of the case the evidence is contradictory—other witnesses relating the occurrence very differently. Which are most entitled to credit is not for us to determine, nor do we now give an opinion what would be the degree of guilt legally imputable to the prisoner, supposing the most unfavorable account which is given of his conduct to be true. In our view, the guilt or innocence of the prisoner stands doubtful—1st, upon the facts whether he inflicted the death—2nd, upon the law and the facts as it regards his guilt, or the degree of his guilt if the death is to be imputed to him.

In his favor at present there are these considerations :—
 1st. There is no imputation of previous malice. 2nd. The occasion was sudden ; what he did was open and in the presence of many peace officers and others. 3rd. A coroner's inquest has investigated the case, and so far as we know has preferred no charge against the prisoner. 4th. An assize has intervened, at which the grand jury, being

especially charged to do so, have also investigated the case and they preferred no charge against the prisoner. 5th. Many of the witnesses whose informations were before us, appear to have given their evidence to the inquest on both these occasions. 6th. The prisoner, for all that appears to us, has remained during the whole time amenable to justice, shewing no inclination to withdraw himself. 7th. The prisoner is spoken of throughout the testimony as a person of peaceable, correct and humane deportment as a peace-officer on all other occasions.

On these grounds we admit him to bail,—not because his detention in close custody would not be justified by the evidence, but because we think, in the execution of a sound discretion, bail may in such a case be granted.

Per Cur.—Prisoner admitted to bail.

DOE EX DEM. MANN V. KEITH.

Where the lessor of the plaintiff having been seised in fee of the land in question, conveyed it in fee to the defendant, and took back a lease for life at a nominal rent, and the defendant went into possession, and so continued for several years, with the lessor's knowledge, but without his express consent: Held that he could not be treated as a trespasser, and ejected without a demand of possession.

Ejectment for the north half of Lot No. 8, 5th concession Grantham, tried before Macaulay, judge, at the last assizes for the Niagara district. It was proved that the lessor of the plaintiff being seised in fee by indenture of bargain and sale, bearing date in August 1824, conveyed the same to the defendant, who is his son-in-law, and who, by another instrument of the same date, and executed immediately after the indenture, leased the same premises to the lessor of the plaintiff for life at a pepper-corn rent. It was stated by one of the plaintiff's witnesses, that Mann was in possession of the land when these instruments were executed, but that the defendant had cultivated the land ever since with the apparent assent of the former. That the defendant has subsequently removed his residence but still holds and works the farm, and that the lessor of plaintiff had not been in possession at any time after the above period. It was also proved that the latter lives with his son in a dwelling-

house near, but not upon, the premises for which this action is brought. On the defence, a witness was called who declared that in June last he heard the defendant ask Mann, in allusion to this action, why he took his land from him, who declared that he never had; and when the defendant complained of being sued, Mann denied having authorized such suit, adding that he had no intention of ejecting the defendant, and had given no such directions, and desiring him to go home and keep his land. This witness also asserted that at the period of this interview, a son of Mann's had insulted the defendant. Richard Mann, the son, with whom the lessor of the plaintiff lived, being then called for, plaintiff represented that his father had authorized him to institute the suit; that he had urged him several times to eject the defendant; that no demand of possession preceded this action; that he had no knowledge of the lessor of the plaintiff wishing the defendant to remain in possession, and that he did not know of any assent on his father's part to such possession on the one hand, nor of any demand of restoration on the other. And being asked how he accounted for his father's long forbearance if he was not assenting, he gave for reason that he was an old and very infirm man, and one who looked little after his business. Upon the whole case, it was contended on the part of the defendant, that it was obvious from the nature of the transaction and the long lapse of time without objection by the plaintiff, that the defendant held the estate with his assent, and if so, that he could not be treated as a trespasser and subjected to an action of ejectment without a previous notice to quit or demand of possession. On the plaintiff's part it was answered that, as possession in the defendant was inconsistent with the lease for life, it followed that in the early part of such possession the plaintiff could have brought an ejectment without any such notice or demand, and that the onus was on the defendant to shew an express or implied assent waiving his right to bring an ejectment, and not on the lessor of the plaintiff to prove a dissent; and that the mere lapse of time, considering the age and infirmities of the lessor of the plaintiff, did not afford a sufficient ground

from which the jury could safely infer a tacit acquiescence. The objects of the parties, or the nature of the arrangement in 1824, did not further appear than as above reported. The jury found for the plaintiff.

In Michaelmas term last, a motion was made to set aside this verdict and grant a new trial.

ROBINSON, C. J.—This case is rather peculiar. About ten years ago, the lessor of the plaintiff, who is now said to be an aged man, was the absolute owner in fee of the premises in question. The defendant is his son-in-law. About the time mentioned, the lessor of the plaintiff, intending, as I should suppose from the complexion of the case, to make an arrangement not uncommon among near relations in this country, executed a deed conveying the land in fee to the defendant, but took back from him at the same time a lease for his (Mann's) life, on condition of rendering a nominal rent. The lessor of the plaintiff having thus parted with the fee and taken back this estate for life, did not thereupon go into possession of the premises, but, on the contrary, the defendant took possession of the farm, and from thenceforth constantly cultivated it. This does not seem to have been against the will of the lessor of the plaintiff; for though he lived very near to the defendant, if not immediately contiguous, and must have seen him constantly, through ten successive years, ploughing, sowing, and reaping on the land, there is no evidence that he ever objected to it, or ever required the defendant to leave the premises. It is not even pretended that he did. On the contrary, there is evidence that he was assenting to the defendant's long-continued occupation; and, considering the relation in which the defendant stood to him, and that the lessor of the plaintiff was probably disabled from his years to work the farm himself, and considering that he was only to pay a pepper-corn rent under the lease—which does not look as if a change of possession was to follow of course, I think the jury would have been well warranted in inferring that nothing else was intended by the parties than that the lessor of the plaintiff should retain the power of repossessing himself of his farm during his life, if at any time he

should desire it in consequence of the defendant disappointing his expectations from any cause. As far as we can judge of the lessor of the plaintiff's intention from his conduct through so long a space of time as ten years, it was not contemplated that the execution of the deeds should, as a matter of course, be followed by Mann going into the actual possession and occupation of the premises.

The legal consequence of the deeds being executed between the parties was, that Mann was entitled the moment the lease was made, to the actual possession, as much as a landlord is when his tenant's term is expired; and Keith continuing in possession, could only be looked upon (in the absence of any stipulation attending the execution of the lease) as a tenant at sufferance; but the long, uninterrupted possession which followed, not objected to by Mann, was entitled I think to much consideration from the jury, and was sufficient to warrant them in presuming that this general unexplained possession was with the actual assent of Mann, not at all in defiance of him, in which case it was not in the option of Mann at any moment to treat Keith as a trespasser, and to throw the costs of an action of ejectment upon him without first desiring him to leave the place. Whether a six months' notice to quit was not called for by these circumstances, it is not necessary now to determine; but I think it was not necessary—no act was proved acknowledging a tenancy. A demand of possession, however, was in my opinion indispensable. The learned judge seemed to lean to the opinion that the long possession, unobjected to, though with full knowledge, on the part of Mann, was sufficient to imply an assent on his part; but he qualified that opinion by adding, that the fact of Mann having expressed no objection and offered no opposition, might have arisen from his inaptitude for business, and the carelessness and indifference often attending great age, and which indeed one of the witnesses ascribed to him; and the jury were told that if they were of that opinion, then his acquiescence would no longer appear, and there would consequently be no necessity for proving a demand of possession. It appears to me that the principle was stated

correctly to the jury, but I see nothing in the evidence that could sufficiently warrant them in applying it as they did. It was not contended that Keith's possession had a tortious commencement. It cannot be intended to be denied that Mann was sane and capable to transact business when the deeds were executed, because it is under the lease executed on the same day as the deed that Mann now claims. No proof was before the jury of any change in the condition of his mind between that period and the bringing of this action, nor any evidence, in my opinion, that at this moment he is not quite capable of exercising his will in respect to his property. So far from it, it is sworn by one of the witnesses for the plaintiff that he expressly desired this action to be brought, while another witness states that he heard him deny ever having authorized it, and express a wish that Keith should not be disturbed. If he has continued capable throughout these ten years of signifying his will in respect to the possession of his property, he should have done so in another manner than by surprising the defendant by the sudden commencement of an action; and if I saw, which I do not, any evidence that he had been latterly incapable of entertaining a wish and making it known—still, if he allowed Keith to possess and cultivate the land for one or more years and for no definite term, the latter could not be rendered a trespasser by the circumstance of Mann's intellect failing—the only consequence should be, that whoever takes upon himself to interpose for his benefit should demand possession at least, before he authorized an ejectment to be brought. Since there is nothing to shew that the defendant was a trespasser at the time of the demise laid in this action, more than at any other time during the ten years that he held possession with the knowledge of Mann, a new trial I think should be granted without costs. 19 Ea. 262; 13 Ea. 210; 13 Ea. 56; 1 Star. N. P. C. 310; 7 T. R.

SHERWOOD, J.—agreed in opinion that a demand of possession was necessary, and therefore that a new trial should be granted.

MACAULAY, J. (after stating the case)—It might have

been intended that the defendant should hold the place as owner and maintain the plaintiff during life, in consideration of the immediate profits, and the ultimate reversion in fee at his decease ; and an undertaking to that effect might have been given, secured collaterally by the lease for life. If such was the case it was not proved, nor did it appear that the plaintiff received any support from the defendant, but on the contrary, it was in evidence that he resided with his son Richard. Again, it might have been a method adopted to ensure the estate to the defendant at the death of the plaintiff's lessor by a conveyance *inter vivos* instead of by devise ; but if so it was not proved. Nor was it clearly in evidence when, or under what precise circumstances, the defendant's possession commenced. I have in the course of the argument, and rather think I must at the trial, have entertained the impression that the defendant was in actual possession at the time the deeds of 1824 were executed, and merely continued to hold after the lease to Mann as he had holden before ; but on examining my notes, I find it stated by one of the plaintiff's witnesses that Mann was then in possession. But in either point of view, it appeared to me a right of action accrued to Mann upon the delivery of the lease for life ; that if the defendant was at that moment in actual possession, as he was constructively by the operation of the bargain and sale, he instantly becomes a mere tenant at sufferance to Mann, and so far a trespasser as to entitle him to an ejectment under his lease without any previous demand of possession ; and that if his possession only commenced after the execution of the lease, *a fortiori* the lessor of the plaintiff might maintain ejectment without demand of restoration, as he might trespass *qu. claus. freg.* without previous entry. In submitting the case to the jury therefore, I must have assumed that upon one principle or the other, the lessor of the plaintiff was in the first instance entitled to bring ejectment without demand of possession, and so far to regard and treat the defendant as a trespasser. Having communicated to them this view, I then said, the important consideration was not whether the lessor of the plaintiff had proved his dissent to such tortious

possession, but whether the defendant had established to their satisfaction a concurrent or subsequent assent, express or implied, converting the *prima facie* tortious into a rightful holding, waiving or extinguishing the right of action in ejectment otherwise subsisting, and depriving himself of the right or power to treat the defendant as a trespasser at any future period without revoking such license, and determining his will by a notice to quit or a demand of possession. I said this appeared to me a matter of fact for the jury to decide under all the evidence—that it was for them to place such construction upon, and to draw such inferences from, Mann's conduct upon this head as it seemed to them to deserve; that if satisfied Mann agreed to the defendant's occupation expressly or by implication—if it was permissive—if the relation of landlord on Mann's part and of tenant on defendant's part had been created, a demand at least should precede the action,—and then to find for the defendant; but that if the defendant held merely a nude possession, unauthorized and not assented to or approved by Mann,—then as no demand would have been required in the first instance, it was not indispensable before the institution of the action, though at a late period of time,—and to find for the plaintiff.

With respect to the evidence, I said no express authority or assent on Mann's part was shewn, and that much seemed to me to depend upon the construction to be placed upon his conduct since 1824. In estimating it, I said it was to be observed that in addition to the unequivocal assent imputed to him in June last after this action was brought, as in evidence, he lived hard by the premises, and must have known of the defendant's occupation; that they were related (as also in evidence), and that deeds had passed between them, which they had heard read; that from silence, especially when long maintained between family connections under such circumstances calculated to call for its expression in the event of disapprobation, an acquiescence or assent might be inferred; that in this case they were in possession of circumstances from which it might be implied, but that in explanation, and with a view to rebut such a

presumption in the present instance, it was represented that not only during late years, but throughout the whole period since 1824, as I inferred, the lessor of the plaintiff was an elderly person—as he must necessarily be from the apparent age of his son Richard who had been examined as a witness—that he was very infirm as well as old, and a person who, owing to the infirmities of age, was indifferent about and paid little attention to his business or interests; that they, from their own observation in life, could conceive the state of apathy into which a superannuated old man might fall, and were to determine how far in the present case the lessor of plaintiff's state of imbecility and weakness should weigh and operate in forming a conclusive opinion upon the question, whether his assent to the defendant's proposition was or was not to be inferred from his silence with full knowledge of the fact, and under the circumstances before them; for that, in my opinion his age and habits, as in evidence, formed proper subject matter for their consideration in making the inference that it became their duty to draw. I did not express to the jury any opinion as to the preponderance or weight of presumptions, but left it open to them to exercise their own judgment in the explanations I endeavored to give them. They found for the plaintiff, and this application is made to set aside their verdict. Upon more fully considering the case—

1st, I retain the impression that a right of action of ejectment accrued to Mann immediately after the delivery of the lease for life, without any previous demand, if the defendant was at that time in possession, and continued to hold afterwards without obtaining his sanction; and that if the lessor of the plaintiff was then in possession, and the defendant afterwards entered without his permission, a similar right equally resulted at the moment of the defendant's entry; and that in either view, the defendant, under the evidence, was at one period so far a trespasser as to enable the lessor to sustain ejectment without entry or demand of possession.—2 M. & S. 265; 1 Camp. 218; 2 Stark. 471; 2 Star. Ev. 37; 2 Camp. 539; 13 Ea. 405; 2 Taunt. 109.

2ndly, I retain the opinion that the true question, under

the evidence, is not whether by anything *ex post facto* the lessor of the plaintiff did or could make the defendant a trespasser, if not so *ab initio*; but whether being so in the first instance he had by anything *ex post facto* waived such trespass and converted a previous wrongful into a subsequent rightful possession, and placed a former *tort feasor* in the situation of a legal tenant. The former idea would reverse the position of the parties, and infer a previous rightful occupation sought to be turned into a tortious and wrongful holding by implication.—Adam Ej. 133; Cowp. 2 Camp. 387, 505; 1 T. R. 162; 6 T. R. 219; 10 E. A. 56; 1 McL. & Y. 286.

3rdly, I also adhere to the opinion that, under the evidence, it formed properly a question of fact for a jury to decide whether by assent, express or implied, the right of ejectment which had vested in the plaintiff's lessor in *limine*, had been extinguished by lapse of time and the other circumstances.—3 Taunt. 78.

4thly, I likewise conceive that in submitting such fact to the jury, it was proper for me to call their attention to what had been said in evidence touching the age, habits and infirmities of the plaintiff's lessor, in making up their minds as to the construction to be placed upon, and the inference reasonably and justly to be drawn from his long silence and abstinence from dissent, with the knowledge that he must have had of the defendant's acts and pretensions. It follows that the verdict in my view was not against or contrary to evidence; but since my learned brothers think that notwithstanding the evidence of the lessor of the plaintiff's imbecility, the other circumstances were so strong that the jury ought much rather to have presumed against him than in his favor, and that I ought to have intimated to them in more emphatic terms than I did such decided preponderance on the weight and bearing of the testimony, I can feel no hesitation in concurring in a new trial on payment of costs. At the same time, though now much inclined to deem the weight of evidence in favor of a presumed assent, I am not so thoroughly persuaded of it as to be prepared to say that as a necessary result in law, a jury ought to draw that con-

clusion. I still think it a question proper for their consideration, although in deference to the stronger impressions of my learned brothers, I acquiesce in a new trial, but only upon payment of costs.

Per Cur.—Rule for new trial absolute.

RICHARDS V. BOULTON.

In case for slander, the defendant may under the general issue shew that the words spoken were used in a privileged communication, and where the words imputed slanderous are spoken on an occasion when either from public duty, private interest or the relation of the parties to each other, the character of the party complaining may be freely discussed, the jury must find express malice upon evidence sufficient to warrant their finding, before the defendant can be pronounced guilty.

This was an action for slander, to which the general issue was pleaded. The trial took place before the Chief Justice at the last assizes for the district of Bathurst. It appeared that the defendant, with several other persons, were joint owners of a new steamboat; that this vessel was nearly complete, and the shareholders were about electing a captain for her, for which situation the plaintiff was a candidate; that the defendant, who advocated the interests of another person, urged another stockholder to support his (defendant's) candidate; that the person so applied spoke of the plaintiff, stating that several shareholders were in his favor, to which defendant replied, "It would be wrong to support a man who has been detected stealing fish," and added, "he chartered a vessel at New Brunswick or Nova Scotia and ran away with the vessel and goods." Defendant also requested this shareholder to state this to the others, and to do what he could to prevent the plaintiff being chosen. The election resulted in the choice of another person, not the defendant's nominee. The plaintiff's disappointment was attributed by several persons to the imputations which the defendant had thus cast upon his character. No evidence was offered on the part of the defence to shew the truth of these accusations. The Chief Justice, in charging the jury, expressed his opinion that the defendant should have offered some evidence in support of the charges he made against the plaintiff, and that not hav-

ing done so, he must be taken to have knowingly uttered them without foundation, and therefore maliciously.

The jury found for the plaintiff and 50*l.* damages.

In Michaelmas term last, a rule nisi to set aside the verdict was obtained, as contrary to law and evidence, and for misdirection.

ROBINSON, C. J.—I am of opinion that the rule should be made absolute, not because the verdict can be properly said to be against law or evidence, but because I think the case was not properly left to the jury, and it is impossible to say what change it would have made in their verdict if they had been otherwise charged, as it appears to me they ought to have been. It is unnecessary to be very minute in referring to the evidence, because the point raised depends upon a general principle, the application of which is to be made by the jury and not by the court.

At the trial, it seemed to me that this case did not fall within any class of cases in which a communication is said to be privileged. I thought it not like the case of a master who has been asked to give the character of a servant, nor like the case of a person who, having an interest in a subject matter, gives as a reason for his own conduct a statement which reflects upon another.

The defendant had, according to Matheson's (the principal witness) account, voluntarily gone forward and had made unasked, a direct, positive and unqualified charge of crime against the plaintiff, and not contenting himself with saying that for such a reason *he* would refuse the plaintiff his support, he urged the witness to go forward and repeat the statements he had made to other stockholders. If the jury believed this testimony (evidence being called to throw discredit upon it as well as on the general character of the witness for veracity), it appeared to me at the trial that it ought to follow as a matter of course that the defendant should prove some ground for the charge which he thus ventured to prefer, or that he should be held to have uttered the words without foundation, and to have made a pretence merely of his privilege.

Now having looked into this point, and reflected more

maturely upon it than I could do at the trial, I am satisfied that I did not sufficiently leave it to the judgment of the jury to draw this inference or reject it according to their view of the whole case. I rather impressed it upon them as a reasonable deduction of law arising from the fact that the defendant offered no evidence in proof of his assertions. In other words, I thought a person acting as Mattheson described this defendant to have acted, was not privileged, unless he was prepared to shew the truth of the imputations he had advanced, or at least some reasonable ground for his believing the truth of them.

But the law is not so. I find that my impression at the trial was erroneous, and I am satisfied that the principle which I overlooked is well established, and is in itself just and reasonable. To utter defamatory words of another, where there is no occasion to justify or call for it, is in itself malicious; the malice is implied from the unexplained injury, and the very uttering of the words gives the right of action. But when the words are shewn to have been spoken on an occasion when either a public duty or private interest, or a peculiar relation between the parties, renders necessary and allowable a free discussion of the character of the person complaining, then malice is no longer implied, but the contrary; because, as the defendant in such case might have justifiably said all he did, whether true or untrue, provided he had no malicious motive and believed it, it follows that it will be presumed he exercised his privilege honestly, unless malice is proved against him. Upon any other principle, there would not be sufficient safety or freedom of conduct upon occasions when public policy or the protection of private interests in the ordinary occurrences of life, makes it necessary to speak openly what people know or believe. In some cases the party may speak from his own knowledge; in others upon the testimony of others which he cannot produce when called upon; in others he may have been led into impressions which he cannot satisfactorily account for. The only fair and proper security is that, when he had a justifiable occasion for speaking of the character of the individual, the jury must

be made to say upon their oaths, after they have heard all the evidence, whether they are or are not convinced that he spoke the words maliciously in order to injure the plaintiff.

The jury in this case might very probably have thought so, and might have found sufficient grounds in the evidence for imputing malice, but the failure of the defendant to give evidence of the truth did not necessarily raise the implication of malice. It should have been submitted explicitly to the jury to say, 1st, Whether they believed the words to have been spoken on an occasion which might give the defendant the privilege of speaking them; 2nd, Whether they really were spoken in the exercise of that privilege, or maliciously and for the purpose of injuring the plaintiff. Express malice should be found by the jury, and the evidence should be sufficient to warrant them in finding it. This principle is established by the following cases:— 1 Camp. 297; 1 T. R. 110; 3 B. & B. 587; Burr. 2422; 4 B. & C. 247; 1 M. & S. 639; 3 Taunt. 246; Bull. N. P. 8.

Whatever ought to have been the verdict of the last jury, or whatever may be the result of another trial upon the same evidence, the defendant is entitled to have the opinion of the jury expressly taken upon the subject of malice; and upon that ground I agree perfectly with my brothers that there must be a rule for a new trial upon payment of costs.

SHERWOOD, J.—Expressed himself of the same opinion.

MACAULAY, J.—Considering the relation of the parties as stockholders in the steamboat, the words laid would seem to have formed a privileged communication—assuming that they were spoken as asserted by the plaintiff in evidence. If so, then the cases establish that a *malicious* motive is not presumed or inferred, and does not result in law, but that it ought to be left to the jury as a substantive fact to be found. *Prima facie* they are regarded as not malicious by reason of the occasion and the privilege. Malice may however be inferred by the jury from the want of probable cause and the circumstances attending the publication, or from other facts, as from the falsity of the charge, &c., if shewn under solicitude, indicating feeling or resentment, &c., In this case the plaintiff does not seem to have offered

any proof to rebut the misconduct said to be imputed to him by the defendant, and to establish the want of probable cause; but without that, I think it might have been left under the evidence to the jury to say whether the defendant acted *bona fide* or wantonly or maliciously; but it was not so submitted to them, having rather been taken for granted that if the words were spoken and damage resulted, the action was sustained as of course, malice being inferred in law; whereas it appears in cases of privileged communications, malice must be shewn as an additional ingredient of the plaintiff's case—that the jury must pronounce on the motives of the defendant.

Per Cur.—Rule absolute for new trial without costs.

MAHONEY V. ZWICK, EXECUTOR.

Where there are issues in law and fact, and a venire as well to try the issues as assess the damages, and a verdict is rendered for the plaintiff, for an amount within the jurisdiction of the District Court, a certificate of costs must be applied for at the trial; and an order cannot be made by a judge, as in cases of assessments after judgment by default, for the taxation of such costs.

Assumpsit against the defendants as executors. *Plene administravit* was pleaded and issue joined. Venire to try the issue and assess the damages. A verdict was rendered for the plaintiff with damages within the competence of the District Court, but no certificate was moved for. In the last vacation, an application was made to the Chief Justice, who tried the cause, to allow full costs, as falling within the rule of this court applicable to assessments upon judgments by default, and the application was again spoken to this term. It was contended that the statute 58 George III. chapter 4, applies only to cases in which the trial has been upon an issue involving the merits and not a collateral issue, though going to the whole action and upon a plea in bar. It was urged that the words in the act—"the judge who tried *the cause* of such *suit* or *action*"—limit its application to such cases only in which *the cause of action* and not the cause upon any plea not putting in issue the cause of action, though going to bar such cause of action, might be tried.

Per Cur.—This was a case in which the judge, if applied to, might have certified at *Nisi Prius*; and if so, the Court cannot direct the the taxation of King's Bench costs.

SHAW. V. TURTON.

Where a verdict was taken for 200*l.* subject to be reduced by arbitrators, the costs to abide the event, and the award was for the defendant, it was set aside as being beyond the submission, the arbitrators being empowered only to reduce the plaintiff's verdict, and the condition as to costs giving them no authority by inference to deprive the plaintiff of it altogether, but applying only to the amount of costs to be eventually taxed.

This action of trespass against the defendant for cutting down a quantity of wood belonging to the plaintiff, was referred at *Nisi Prius* to arbitration. A verdict was taken by consent for 200*l.* damages, subject to be reduced by the award of three arbitrators, or any two of them—the costs of the cause and of the reference to abide the event. The arbitrators did not agree, but two of them joined in an award, not merely reducing the damages, but in favor of the defendant, declaring that the plaintiff had no cause of action, and directing that a verdict be entered for the defendant. *Spragge* moved to set aside this award: 1st, Because it is not authorized by the submission, which only enabled the arbitrators to reduce the damages; and 2nd, Because the arbitrators unjustly refused to be governed by the evidence, which plainly proved a trespass to a large amount.

Per Cur.—Whatever may be the truth respecting the justice or injustice of the award, we should have found it difficult, if not impossible, upon the statements before us, to have given relief upon that ground; but on the other objection we are of opinion that the plaintiff is entitled, as a matter of right, to have this award set aside. It is clear that the plaintiff agreed to a submission with no other view than that the arbitrators might assess the damages at any amount they thought right within the verdict taken. He did not agree that the verdict should be wholly set aside by the arbitrators. When this is intended it is always expressed. The condition that the costs of the cause shall abide the event may seem at first to contain an assent by implication that the verdict may be directed to be entered

for plaintiff or defendant, as the arbitrators think just; but that construction would be repugnant to the power given, which is expressly to reduce the damages. And the effect of these words is more properly, we think, to be confined to the amount of costs, which in actions of trespass depend upon the amount of damages in certain cases. The parties never meant, in our opinion, that the arbitrators should do more than estimate the damages for a trespass which was admitted by agreeing to the verdict.

Per Cur.—Rule absolute to set aside award.

DOE EX DEM. MILLER V. DIXON.

Where, in a deed, a certain quantity of land, and half of a saw-mill thereon erected, were conveyed, and the description of the premises covered the whole site of the mill: Held, that the express words must control the operation of the deed, and that the vendee was entitled to only half of the mill.

In this ejectment, tried at the last assizes for the Home District, a point was reserved for the consideration of this court upon the construction of a deed of bargain and sale, given some years ago by Miller, the lessor of the plaintiff, to the defendant. Miller, being the owner of a tract of land in Etobicoke, upon which there was a saw-mill, conveys to Dixon two small portions of the land, containing together $6\frac{1}{2}$ acres; also "one-half of the saw-mill." These small pieces of land are particularly described by metes and bounds, which do in fact embrace the site of the saw-mill, so that if he had said nothing in the deed about the saw-mill, it would of course have passed to the grantee with the ground upon which it stood. But by the deed, Miller sells one-half the mill, and he expressly grants access to the premises, and grants the property in one-half only of the pine lumber growing on the whole lot. Relying on the want of any express exception in the deed of part of the land on which the saw-mill stands, the defendant contests Miller's right to it, and maintains exclusive possession. An actual ouster was proved. If the court should be of opinion that the deed did not convey one-half the saw-mill, the plaintiff must recover; if the whole passed, then the verdict must be for the defendant.

The case was argued in Michaelmas term last by *Draper* for the plaintiff, and *Washburn* for the defendant.

ROBINSON, C. J.—We think the plaintiff is entitled to recover, there being no doubt that the intent of the parties, apparent upon the deed, was that half the mill only should pass, and there being no reason in law why in such a case the intent shall not prevail. The principle that the intention shall govern is just in itself, and is sustained to the fullest extent by adjudged cases. Lord Hobart, in *Trenchard v. Hoskins*, Winch. Rep. 93, expresses it clearly. “Every deed,” he says, “is to be construed according to the intention of the parties, and the intents ought to be adjudged of the several parts of the deed as a general issue out of the evidence, and intent ought to be picked out of every part and not out of one word only.” Lord Ellenborough assents to this doctrine in *Havel v. Richards*, 11 Ea. 643, and in *Barton v. Fitzgerald*, 15 Ea. 540, in which latter case his lordship says, “It is a rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected *ex antecedentibus et consequentibus*—every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done.” In 4 Cruise Dig. 418, it is laid down, that when there are any words in a deed that appear to be evidently repugnant to the other parts of it and to the general intention of the parties, they will be rejected as insensible; for the words are not the principle things in a deed, but the intent and design of the parties. So here, although the metes and bounds, if followed precisely as laid out, embrace the whole site of this mill; yet inasmuch as it is clearly expressed that one-half the mill only is intended to be conveyed, so much of the description as would embrace the mill must be repugnant to the evident intent. The cases on this head are so numerous that it is unnecessary to cite them. *Doe ex dem. Raikes et al. v. Anderson*, 1 Star. N. P. C. 155, is strongly in point; and more especially the case of *Doe ex dem. Freeland v. Burt*, 1 T. R. 701, is conclusive in favor of the plaintiff—for there the doctrine is recognized that the question, whether “parcel or not of the thing demised,” is

emphatically a question upon which parol evidence may be admitted to explain a deed. The present case is much more clear, for there is no need of resorting to parol evidence—the deed itself shews that one-half of the mill only was intended to be granted; and in fact we see no ground whatever for questioning the plaintiff's right to recover.

Per Cur.—Postea to the plaintiff.

SOPER V. BROWN AND RIORDEN.

A distress made more than six months after the expiration of a tenancy, is illegal, and a continuation of the tenancy will not necessarily be implied, from the party's remaining in possession of the premises, without any act to shew the nature of the holding.

Trespass *qu. claus. fregit*, and for taking goods. Plea, not guilty. The cause was tried at the last assizes for the Newcastle District *coram* Macaulay, J., who reported as follows:—It appeared in evidence that at the time when, &c. the plaintiff was in the possession of the south 50 acres of lot No. 21, 2nd Concession of Hope, that the defendants (Brown as landlord and Riorden as bailiff), on or about the 19th September, 1833, distrained a quantity of goods and chattels, including a yoke of cattle then at work, all property of the plaintiff, upon the lot above mentioned, as for 40*l.* rent due and in arrears, from John Soper, a brother of the plaintiff, to Brown, on the 1st August, 1833. After proof of the number and value of the articles sold, it was offered in evidence that the plaintiff had possessed the *locus in quo* a number of years; such possession was, however, rebutted to a certain extent on the defence. The defendants proved a deed from Pilatiah Soper, the father of plaintiff, and the original owner of the lot, conveying to Brown the whole lot in fee, dated 28th July, 1831, for a consideration of 700*l.*, said to be secured by promissory notes. Also a lease from Brown to John Soper of the said lot, including the 50 acres claimed by plaintiff for one year from the 1st November, 1831, at a rent of 40*l.*, payable quarterly, such lease bearing date 24th November, 1831, with a proviso that rent should be payable—10*l.* 1st February, 10*l.* 1st May, 10*l.* 1st August, 10*l.* 1st Nov. The tenant to be al-

lowed to take away all the crops raised within said year, and to have half of all winter crops put in during the year—the ensuing season. It appeared that after the conveyance from old Soper to Brown, and the lease to John Soper, the plaintiff had kept the premises and resided a winter in Clarke, but that he afterwards returned and resumed possession of his own behalf, without holding or claiming under Brown and his tenant, John Soper. It also appeared that John Soper held over generally till September, 1833, the month of the seizure, when he absconded; and that during such holding over he had cultivated the estate, but whether he withdrew before or after the distress did not appear. In order to rebut Brown's title to the south quarter of the lot, the plaintiff proved that Soper, the father, had executed to him a conveyance of the same in fee several years before the deed to Brown, but it was not procured and had not been registered, and it had been cancelled. It was clearly given in the first instance as an occasional deed to enable the plaintiff to vote at an election, and directly afterwards restored to the grantor to be cancelled, which was effected by mutilation. No money was paid upon such conveyance, and though the grantor had said he was indebted to the plaintiff, his son, for assisting him in his farm, it appeared to me on the whole to be a voluntary conveyance as between the plaintiff and Brown, a subsequent purchaser for value; so that without regard to registration (it not appearing that old Soper's was a registered title), and admitting that as between father and son the occasional deed might be operative and binding, so as to have imparted an estate to the plaintiff not liable to be divested by the destruction of the indenture of bargain and sale (which the instrument was), yet the defendant Brown being a subsequent *bona fide* purchaser for value, and seemingly ignorant of this transaction, my impression was that he had a right to treat it as a voluntary assignment, void as against him under the statute 27 Elizabeth, chapter 4; and I directed the jury to regard that instrument as a nullity, and this direction has not been questioned. The case then rested upon the legality of the distress. It appeared to me the defendant

Brown had shewn title to the *locus in quo*, a lease thereto to John Soper, and rent due ; accordingly, that the distress seemed justified. There was a question as to the right of property in the oxen, also in some wheat ; but, all being found on the place, seemed liable. It was urged that a defect of fences was proved, and that the cattle belonging to plaintiff, a stranger, could not be seized, without proof that they had been levant and couchant : to which I answered that, if material, the levancy and couchancy might be inferred from the evidence, but that it was clear (however the cattle of a stranger) that they had not escaped by reason of defective fences, but had been voluntarily introduced by the plaintiff.—4 T. R. 565 ; 2 Inst. 132-3. It was also urged that, as beasts of the plough, they were exempted by law, unless after proof of a deficiency of other distress : to which I answered, that however available such a ground would be to the tenant himself, or his subtenants, that it could not, I thought, be taken by the plaintiff, a mere stranger, in tortious possession, and not holding under or on behalf of the defendant Brown, or his tenant, but adversely to both. The jury found for the plaintiff 3*l.* 7*s.* 6*d.* damages, being the value of the chattels seized and sold.

In Michaelmas term last, a rule nisi was obtained by defendant, to which cause was shewn, contending that Brown had no right to distrain at all.

ROBINSON, C. J.—Upon the evidence, as reported by my learned brother, I am of opinion that the verdict rendered for the plaintiff in this case was proper, and should be allowed to stand. The verdict is not excessive ; it is for the value of the goods merely, which, being the property of the plaintiff, were seized upon land occupied by him (though, to be sure, it was included in the lease from Brown to John Soper), and sold as a distress upon a claim of rent due by the latter. Laying aside for the present any claim to exemption from distress, which particular description of goods are allowed by law to have on grounds of public policy, there can be no doubt that goods of a stranger, being upon the premises demised, may be distrained for rent due by the tenant. But before we set aside this verdict, which

the plaintiff has obtained, we must be satisfied that, under the circumstances of this particular case, the distress was legal; for if it was not, it would be hard indeed that the plaintiff should not have that redress which the verdict, if it be allowed to stand, will afford him.

In my opinion, the distress was clearly illegal, because, so far as respects the rent accruing for the last quarter of the term demised, it was made more than six months after the termination of the lease, and was, therefore, not authorised by the statute 8 Anne, ch. 14, secs. 6 & 7, which alone gives to landlords the right to distrain after the term ended. The common law gave no such remedy except while the relation of landlord and tenant subsisted. It is further to be considered, that for all the rent claimed after the expiration of the term, viz., after the 24th November 1832, there never was a right to distrain at any time—for during that period John Soper was only tenant at sufferance—no act having been done by Brown, nor any act of Soper acquiesced in by him, which could turn the tenancy at sufferance into a tenancy at will, and upon which a renewal of the term for another year, upon the former rent, could be implied. In a case like this, debt would not lie for the rent claimed after the lease expired, and much less could the owner of the land distrain.—Gilb. Debt, 376. When the tenant merely holds over, after the certain term is ended, *double* value may be recovered of him in an action, under 4 G. II., if notice has been given by the landlord; but the relation of landlord and tenant does not subsist, nor is there, in my opinion, any remedy by distress. When, indeed, the tenant, by the terms of his original lease, has an option to extend his term from year to year, and gives notice that he will not continue, but will quit the premises at the expiration of the current period, and, nevertheless, in disregard of his own notice, improperly holds over; then, under 4 G. II. ch. 19, he is liable not to double value, but to double rent; and for this double value it is admitted that the landlord may distrain: the statute, it is held, fully authorises it, and it is reasonable—because by such conduct the tenant is considered as waiving or setting aside his own notice,

and continuing still a tenant for the new year on which he has entered: such would have been his situation, if he had not given the notice which he abandoned—and the only difference is, that he is made to pay double rent instead of single, on account of the inconvenience which his inconstant conduct may have thrown upon his landlord;—in the latter case the relation of landlord and tenant continues, and therefore double rent is given, and the remedy by distress;—in the former case, because there is no tenancy, it is double value which the statute gives, not double rent—and for this double value the owner of the fee cannot distrain. In such case I think he cannot distrain, upon the principle that there is really no tenancy, independently of the objection that the value is not ascertained: the distinction is plainly stated in *Soulsby v. Neving*.—9 Ea. 312. In this case, to be sure, the landlord gave no notice to quit, and therefore what is said of double value would not apply; but it is equally true, nevertheless, that the relation of landlord and tenant is wanting here, where nothing is shewn but the mere wrongful holding over.—2 Saun. 284, n. 2; 1 Rol. Ab. 672; 1 H. Bl. 5, 311; 8 Ea. 360; 2 Taunt. 148.

Upon these grounds I think the distress illegal, and that the plaintiff should retain his verdict; and if the case were doubtful upon this main ground, it would be material to consider, further, that even if the mere holding over by John Soper could make him a tenant, and liable as such to be distrained upon, still he did not actually hold over the premises upon which the distress was taken, but that quarter of the lot had been some time before and then actually was possessed by the plaintiff in this action; so that in truth the plaintiff's goods were seized upon premises which he was himself occupying, to pay a rent claimed of a third person, who neither had a lease of these premises, nor occupied them by himself, nor by others, for the period in respect of which the rent was claimed. I am inclined, besides, to think that the oxen of the plaintiff, as beasts of the plough in use, were privileged at all events from distress, if there were other goods sufficient; but is not necessary to examine this point. I think the rule must be discharged.

SHERWOOD, J.—I concur in opinion with my brother, that the verdict should not be disturbed. With respect to the question—how far the mere holding over of the tenant without the previous consent of the landlord necessarily makes him a tenant from year to year, on the same terms as mentioned in the expired lease—I am of opinion it has not that legal effect. To constitute a demise, there must be a contract, either express or implied, between the parties, for the possession and profit of lands and tenements on the one side, and a rent or recompense to be paid on the other, for some determined period.—Bar. Abr. title, “Lease.”

The principle to be extracted from all the cases, as to what constitutes a tenancy from year to year, where the tenant holds over after the term stated in the lease, is found in the case of *Right ex dem. Flower v. Darby et al.*—1 T. R. 156. Lord Mansfield said on that occasion, “if there be a lease for a year, but by the consent of both parties the tenant continues in possession afterwards, the law implies a tacit renovation of the contract—they are supposed to have renewed the old agreement which was to hold for a year.” In the case now before the court, the evidence does not shew that the landlord ever gave his express consent to the continuance of the tenant’s possession after the term had ended, nor does it expressly appear that the plaintiff ever requested permission to hold as tenant. If the circumstances of the case afforded legal evidence to go to the jury, to decide whether the parties intended to continue the relation of landlord and tenant on the same terms as stated in the expired lease, and the jury had found the fact to be so, the plaintiff must have been considered as tenant from year to year. The intention of the parties, however, was a matter of fact, and not a conclusion of law; and as the jury have not found the fact, I think the plaintiff must be considered to have been merely a *tenant at sufferance* from the time the written lease expired; in such a case no distress can legally be made, because the continuation of the tenant’s possession is adverse and tortious, although its inception was lawful.

The cases of *Doe ex dem. Cheney v. Butler*, and *Knight v. Bennett*, go to establish the principle that where there is no express contract between the parties, their intention to continue the lease upon the original terms is a matter of fact determinable by the jury, on evidence admitted by the court. —*Cow.* 243 ; 3 *Bing.* 361.

MACAULAY, J.—A question has been raised, not made at the trial, but very proper now to be considered in determining whether this verdict be legal or not, viz., whether the defendant Brown, had any right to distrain at all. It will be seen that the lease for a year expired 1st November, 1832, and that under the statute 8 Ann, c. 14, s. 6, the landlord could not distrain for any arrears of rent due up to that period after the expiration of six months. That he however did distrain in September, 1833, nearly a year afterwards, for rent partly due under the lease and partly for that accrued since, during the time the tenant had held over.—2 *Camp.* 115 ; 11 *Ea.* 395 ; *Yel.* 148 ; 11 *Mod.* 209 ; 1 *Ea.* 139 ; 1 *Esp.* 237 ; 4 *Camp.* 136.

It would seem clear, that unless the holding over can be regarded as a protraction or continuance of the original term, the landlord Brown was not entitled to distrain for any rent due for the first year after the lapse of six months, and consequently, that so far the distress was excessive. It would not follow that it was altogether illegal ; that would depend upon his right to distrain for the quarter expired of the current year in which the tenant held over.—6 *D. & R.* 160 ; 4 *B. & C.* 51. I am not free from doubts upon the latter point as a general question, but inasmuch as it is manifest that however such tenant may have holden over the residue of the lot, he did not and could not have so held the *locus in quo*, the south quarter, (for it was proved to be in the possession of the plaintiff, upon a distinct claim of his own, equally adverse to the landlord and tenant). The tenant being out of possession of this portion of the premises, and not holding over the same, it would seem to follow that upon such portion, so holden adversely by the plaintiff, the defendant Brown could not distrain at all, not for rent accrued during the first year, for two reasons, first,

because six months had elapsed ; second, because the tenant had ceased to continue in possession ; and he could not distrain for the rent subsequently claimed to be due by such tenant, because that tenant did not hold over and was not in possession of the fifty acres held by the plaintiff. I concur with the rest of the court therefore in deeming the verdict right, relying principally upon this ground.

Per Cur.—Rule discharged.

DUCAT V. GREEN.

Where certain matters in difference between A. and B. were referred to arbitration, and also "all costs of suit commenced or prosecuted by either party, whether civil or criminal," and the arbitrators awarded that B. should pay a large sum to A. and also all costs of suits : Held that the award was sufficiently final without stating that the suits should cease, and that it could not be impeached, because damages had been estimated by the arbitrators on some matters into which they should not have inquired.

On the 27th September, 1834, the parties in this cause entered into bonds of arbitration. A general reference to these arbitrators or any two of them, using all the ordinary terms, and adding, "and also all costs of suits commenced or defended by either party, either civil or criminal," and the costs of the arbitration to be in the discretion of the arbitrators ; award to be made on or before the 14th October next. On which day two of the arbitrators awarded that Green should pay to Ducat, on the 3rd day of November then next, 207*l.* 3*s.* 6*d.*, and should also pay all the costs of the *said suit*, both civil and criminal, to be taxed by the proper officer, that each bear his own costs of the award, and that on payment of the said sum of 207*l.* 3*s.* 6*d.*, and also the costs of the said suit, the parties shall execute mutual general releases of all actions, causes of action, bills, bonds, specialties, &c. &c.

There appeared to have been an action of assumpsit and an action of trespass commenced by Ducat against Green, the costs in which were taxed by the master at 7*l.* 11*s.* 2*d.* and 1*l.* 14*s.* 8*d.*, and an indictment at the Quarter Sessions, against Green and others for assault, &c. in which Ducat was prosecutor, and in which the clerk of the peace taxed the costs at 5*l.* 1*s.* 3*d.*

In Michaelmas term last, *Sullivan* moved to set aside the award, producing affidavits, on which he founded an objection, that the arbitrators had mistaken the law; that the award was not final, as not providing that the criminal suit should cease; that the arbitrators decided on matters illegally submitted; that the award evinced prejudice; that the arbitrators took matters into consideration, in estimating damages, over which they had no authority to enquire.

Spragge shewed cause, and produced affidavits explaining the ground of the award in part, by way of answer to the defendant's affidavits.

Per Cur.—We see no ground on which relief can be afforded, though it is a case in which we would gladly lay hold of any reason that would legally justify us in throwing open this matter, for we are strongly impressed against the justice of the award; but the parties were both heard—nothing was awarded upon that was not submitted, and the award is final, and on the face of it unexceptionable. All that can be said is, that the award is for a sum much beyond what seems reasonable, but we cannot say it is a case in which we can interfere on such ground.

Per Cur.—Rule discharged.

GLYNN V. DUNLOP.

It was considered no ground for setting aside an arrest on a *capias ad satisfaciendum*, that several terms had elapsed after the return of the executions against goods before the *capias ad satisfaciendum* issued.

In June 1831, this cause was pending, and on the 20th of that month defendant filed a rejoinder to plaintiff's replication. On the 19th August 1831, a four-day rule was taken out by defendant for plaintiff to enter the issue, and served on the 26th August. On the 21st November 1831, judgment of *non pros.* was signed for not bringing in the issue. On the 24th November 1831, *fi. fa.* issued on this judgment, which was returned *nulla bona*; on the 29th June, 1832, an alias *fi. fa.* was taken out, also returned *nulla bona*. On the 5th November 1834, the plaintiff was arrested on a *ca. sa.* returnable this present term. The rule to enter the issue was served on the plaintiff's attorney; and an application was made on behalf of the plaintiff to set aside this *ca. sa.*,

and that he might be discharged—1st, for irregularity in obtaining the judgment of *non pros.*; and 2nd, for the long delay in suing out execution against the person. An affidavit was filed, in which the plaintiff swore that defendant had long ago left this province, which induced him to forbear proceeding, and that he was ignorant of the judgment of *non pros.* till he was taken lately on the *ca. sa.*

Spragge for defendant.

The Court discharged the rule, saying, that as to the first ground it was too late to object to the judgment of *non pros.* for irregularity (if it were irregular), after a lapse of more than three years, and several writs of execution taken out and returned.—1 M. & S. 478. As to the second ground, the court saw no reason to interfere—the judgment being in force—and no *scire facias* being necessary under the circumstances.

Per Cur.—Rule discharged.

BANKER V. GRIFFIN.

Mesne process cannot issue under the Absconding Debtors' Act, until three months have elapsed from the first advertisement under the attachment.

In Michaelmas Term last, a motion was made by defendant to set aside the service of the writ and all subsequent proceedings, with costs, for irregularity, on the following affidavits: defendant swore that he was never served with any process, paper or writing of any description in this cause; that he never absconded to avoid service of process; that he had sued plaintiff in Orleans County, New York, and obtained judgment against him; that plaintiff appealed—and that in April last defendant went to the States to prepare for the appeal; that in June he returned to his place of abode to get some papers, and then returned to New York and stayed there till September last, when he returned to this province. John Griffin, his father, in an affidavit sworn September 1832, swore that defendant always lived with him, and that no paper, &c. in this cause had ever been served on him (deponent), or left at his place of abode, that he knew of. In another affidavit, sworn last October, he swore that his son was absent from 15th April to 26th June last; that some day between the end of May and 10th

of June the deputy sheriff came to deponent's house and enquired for defendant, and left there a copy of a writ of *capias ad respondendum*: this was confirmed by the affidavits of two other persons present at the time. In answer, Yager, the deputy sheriff, swore that on 29th May 1834 he left a copy of a *plur. ca. re.* in this cause at defendant's last place of abode with a grown up person there, and William H. Walker swore that he affixed a copy in the crown office of the Midland District on the 16th May 1834.

Damages were assessed in this case at Kingston in 1833, and in Michaelmas following defendant moved to set aside the service of the writ and all subsequent proceedings, for irregularity, and a rule *nisi*, granted on that motion, was made absolute by Mr. Justice Sherwood at chambers 12th January 1834.

The Court saw no irregularity in the proceedings last had and discharged the rule, remarking that if the defendant had indeed not absconded, and did not come within the scope of the Absconding Debtors' Act, the fourth clause of that statute points out his remedy; that upon such a statement as the defendant's affidavit contained, the court would not summarily interfere, and they deemed the service of proceedings, since the order setting aside the service, &c. in January 1834, to have been regularly made.

Per Cur.—Rule discharged.

MYERS V. HOWARD ET AL.

Where a statute gave power to certain persons to enter on lands in the neighbourhood of a bridge, to quarry stone to keep the bridge in repair, &c. doing no unnecessary damage therein: Held that the power must be strictly pursued, and that any abuse of it by excess was punishable in trespass.

Trespass brought against the defendants for quarrying a quantity of stone on the plaintiff's land. The plaintiff is the proprietor of land near the River Trent, where a bridge has been recently constructed, under the authority of a provincial statute, 3 W. IV. ch. 34.

One of the defendants was a contractor with the public commissioners for building the bridge, the others were workmen employed under him. They had taken up a quantity of stone on the plaintiff's land for the purpose of

building the bridge, but the plaintiff complained that they had not exercised the power given by the act, with a due regard to his interests; that instead of taking the stone, as they might have done, from one or two places near the river, and adjacent to the bridge, they had encroached more upon his land than was necessary, and had disfigured his ground, by breaking it up in a number of places and opening many more quarries than there was any occasion for, except merely for the greater convenience of getting the stone near the surface; there was some complaint also against the defendants for burning some rails which belonged to the plaintiff. Upon the trial several witnesses declared that an unnecessary number of quarries had been opened; that the soil had been broken up in various places, without apparent necessity, the holes not being filled up again, and the loose fragments being suffered to encumber the surface adjacent to the excavation. It also appeared that the defendant's workmen had burnt rails of the plaintiff, but they were not consumed in the business of the defendant, nor did he or his foreman seem to have encouraged or connived at the misconduct of his labourers. On the other hand, there was evidence that from the nature of the ground opened no substantial damage could have been sustained by the plaintiff, and that no vexatious or wanton injury could be attributed to the defendants. Upon the whole, it formed questions for the jury—1st, Whether the defendants had been guilty of any excess in exercising the license which the act conferred on the contractor to the commissioners; or in other words, whether, in procuring the stone, he had done as little damage as might be in the execution of the powers granted to him in that behalf? 2nd, Whether he had so far directly or tacitly acquiesced in the destruction of the plaintiff's rails, as to render himself responsible for it? Macaulay, J., who tried the cause at the last assizes for the district of Newcastle, reported—that in his opinion there was little satisfactory evidence on the first point, and less on the last. That although from the evidence it might be inferred that the description of the soil was unnecessarily extended, yet he did not perceive proof of any actual damage

resulting therefrom, the *locus in quo* being uncultivated grounds along the margin of the Trent, the opening of which occasioned material detriment to the plaintiff. It was contended for the plaintiff, that the contractor was not entitled to the protection of the act without shewing an authority from the commissioners to enter, as their agent, upon the plaintiff's lands; but Macaulay, J., thought that being their contractor the statute gave him authority without its being expressly conferred by the commissioners. For an excess he thought trespass a proper remedy, and under the general issue the special matter of defence consisted of matters of fact exclusively, namely—whether the defendant had unnecessarily committed any excess of damage to the plaintiff unauthorised by the act. That although he would have been better satisfied with a verdict for the defendant, or for a nominal sum only, he could not say he thought the jury evinced any intemperate feeling against the defendant, or that they did not appear to have acted conscientiously in the verdict they pronounced. In the course of the case it was (upon being urged on the part of the defendant) incidentally stated by Macaulay, J., that the plaintiff was not entitled to demand any remuneration from the commissioners for damages occasioned in the taking such stone as was strictly required for the bridge and authorised by the act. The jury however found a verdict for the plaintiff, with 7*l.* 10*s.* damages.

A rule *nisi*, to set aside the verdict, was obtained in Michaelmas term last by the defendant, who shewed cause.

ROBINSON, C. J.—(after stating the case).—The statute (13 sec.) gives “to the commissioners, their agents or workmen, contractors or servants, authority to enter upon the lands of any person or persons, and to take and carry away stone and other materials out of any lands of any person adjoining or lying contiguous to the bridge, which may be necessary for constructing and keeping in repair the bridge and the approaches thereto, and to place, lay, work and manufacture the said materials on the ground near to the place where the said works shall be intended to be made; and to construct, *make* and *do* all other matters and things

which they shall think necessary and convenient for the making, completing, &c. the said bridge, &c., in pursuance and within the true intent and meaning of this act; they, the said commissioners, doing as little damage as may be in the execution of the powers granted to them."

The 15th and 21st sections of the act were referred to in the argument, but they have no application, in my opinion, except to cases in which the damages done is such as the act permits. Where it can be truly imputed to the commissioners, contractors, &c. that they have gone beyond the authority of the act, and have committed trespass, there is nothing to restrain the party from resorting at once to an action of trespass. He may however, if he pleases, admit the right of the contractors to do what they have done—and in that case he could proceed to urge his claim in the manner provided in those and other clauses of the act.

The statute allows the general issue to be pleaded; it was therefore unnecessary for the defendants to plead the statute specially, nor had the plaintiff occasion or opportunity to allege specially in pleading the excess of which he complains; it all depends upon the evidence. The learned judge at the trial, charged the jury, as I think, correctly, that the authority given by the act, though for a public purpose, was to be closely pursued, since it was given with a qualification that no unnecessary damage should be done; and, moreover, upon general principles of law, acts which give powers infringing upon private rights are to be construed with a strict regard to the property of the subject, allowing no undue extension of the terms in which the authority is conferred. The case seems to have gone fairly to the jury in that respect, and they found for the plaintiff.

Considering the whole complexion of this case, that the ground is represented as being all stony, and of little value for cultivation; that there is no imputation of any unworthy motive; that the witnesses differed in opinion as to whether the opening of several quarries was necessary or not—the jury would have been well warranted, I think, in finding a different verdict, for I do not see anything to tend to the conclusion that the defendants acted otherwise in quarrying

the stone than the proprietor of the land would generally do in pursuing the same object ; nevertheless, they were the proper judges whether the powers of the act were abused ; and as there was sufficient evidence to support their verdict, it should not be for disturbing it in a case of this small amount, merely because the damages were assessed at rather too much, or because the evidence was contradictory ; but it seems that at the trial the jury were charged under the impression on the mind of the learned judge that the statute gave no recompense in damages for the value of the materials taken, and this consideration was likely to influence the jury strongly, both as to the amount of their verdict and as to their holding the defendants strictly to a careful exercise of the powers given by the act. Now, we are all of opinion that the plaintiff could, under the act, have claimed compensation for the value of the stone, in the same manner as for land occupied—and that in this respect the jury were under a wrong impression, in consequence of what was stated to them at the trial—and there should, on that account, be a new trial, with costs, to abide the event.

SHERWOOD, J., concurred.

MACAULAY, J. (after stating the case)—I think I was in error at the trial in stating that the plaintiff was not entitled to demand remuneration for the stone taken, and that the plaintiff to this extent is entitled to compensation. A contrary idea may have operated with the jury unfavorably to the defendant, and his case was, I think, entitled to go to them without any prejudice or false impression touching the law of the matter. Remuneration being provided by the statute, it may not unreasonably be argued that to sustain trespass, the excess complained of should be a malicious, vexatious, wanton, or wilful disregard of the plaintiff's right, and not merely an inadvertent excess, unintentionally committed in the *bona fide* exercise of the license conferred by law, without culpable negligence, or manifest or apparent desire to injure or annoy the plaintiff. Deeming the case on the merits by no means strong in the plaintiff's favour, and apprehending that any misconception

of the true import of the statute, on the score of compensation, may have had an influence with the jury to the disadvantage of the defence, I concur in a new trial.

Per Cur.—Rule absolute.

FISHER ET AL. V. BEACH.

Where a defendant moved to set aside an attachment and subsequent proceedings under the Absconding Debtors' Act, several months after the last proceeding was had, on the ground that the plaintiffs were not inhabitants of the province, but filed no affidavit shewing that he was not indebted to any inhabitant of the province. the court refused the rule and left him to his action.

Tiffany, for the defendant, moved in Michaelmas term last to set aside the warrant of attachment, process and all subsequent proceedings, for irregularity, on the ground that the plaintiffs were residents in Lower Canada, and have been continually resident in Lower Canada for two years next preceding the date of the affidavit made, and have neither of them been resident in Upper Canada within that period.

The attachment issued 21st October 1833; further proceedings have been had but no verdict taken.

Per Cur.—Since defendant has delayed so long moving we ought not to interpose summarily after a lapse of so many months, and thus leave officers and others subject to actions for what has been done under an attachment regular on the face of it and supported by sufficient affidavits. The defendant's counsel says he moves this on behalf of Beach; if so, as Beach must know if he is indebted to any inhabitant of this Province, when he went away he might have stated that he was not. This is not done. The defendant was an inhabitant of this province, he is not shewn to have returned; his absconding is not contradicted; it is not very probable that he was in fact not indebted to any person in this Province. If the truth be so, he may put the matter to proof in an action if he pleases.

Per Cur.—Rule discharged.

VAN EGMOND ET AL V. JONES.

Where on a reference between A. and B., A's agent attended on his behalf, and after B. had given evidence to the amount of 200*l.*, retired, understanding from the arbitrators that the case was closed, and B. in his absence induced two of the arbitrators to award him 1000*l.*, the third refusing to consent. The award was set aside on payment of costs.

The *Solicitor General* moved in Michaelmas term last to set aside the award made between the parties in this cause. The defendant is one of the Commissioners of the Canada Company, and the plaintiffs having a claim upon them, the amount of which was in dispute, relating to work done by him in opening a new road, the matter was referred to arbitration, the defendant giving his personal bond to the plaintiffs and receiving their bonds to him. On the meeting of the arbitrators this matter was investigated, Mr. Prior attending as agent on behalf of Mr. Jones. In his affidavit he swore that he did not leave the arbitrators before he understood that the case was closed and that no further evidence was to be produced, and that under this impression he departed. His statement was confirmed by the evidence of one of the arbitrators. But after Mr. Prior was gone, the plaintiff made a long statement to the arbitrators of his services to the Canada Company in this and other matters, and the losses and inconvenience he had sustained, and claimed heavy damages. Two of the arbitrators made an award in his favour for 1000*l.*, the third arbitrator retired, refusing to take any part in their proceedings. After the award was made Van Egmond addressed a letter to the Commissioners of the Canada Company, in terms shewing at least that he thought he had gained an advantage over them, and tending to confirm the idea that the opportunity was afforded by the absence of Mr. Prior or any other person on behalf of the defendant. To rebut the case, the plaintiff filed two affidavits negating some part of the statements of Mr. Prior and of the arbitrator who retired, but leaving material parts unanswered.

ROBINSON, C. J., delivered the opinion of the court.

We are of opinion that this rule should be made absolute. The affidavits of Mr. Prior and Mr. Allan disclose a case of flagrant misconduct on the part of the two arbitrators who

made the award. Their statements are in a certain degree (but not in a satisfactory manner) repelled by the affidavits of Anthony Van Egmond and Mr. Cornish, but the most material allegations are left unanswered. It is not denied that the only evidence received related to the work appraised by the arbitrators at 200*l.*, and that after the agent of one of the parties had retired, without any reason being given him to apprehend that demands were to be urged of an indefinite amount for damages respecting the work and for other claims, a statement was made by one of the plaintiffs, upon which statement alone an award was given for the sum of 1000*l.* The letter of one of the plaintiffs (the same who addressed the arbitrators) announcing that award, is an extraordinary document, and tends strongly to corroborate the allegations against the award. It would, in our opinion, be most unjust to allow such an award, so made, to be conclusive. It should be set aside, but on payment of costs, for the defendant, or some agent or attorney for him, should have attended upon the arbitration in a manner more business-like, than appears to have been done. It is positively denied that the case was gone through, or that it was stated to Mr. Prior that the evidence was concluded. Except as to the costs, however, we have no hesitation. The plaintiffs have seen the statements made on the affidavits filed last term, and have met them in a most imperfect manner, not specifying what sum they had claimed while Mr. Prior was present or before the bond was entered into, and not stating on what pretence or on what evidence 1000*l.* was allowed to them.

It is evident from the letter that these points could not be satisfactorily answered.

Per Cur.—Rule absolute on payment of costs.

PARENT v. M'MAHON.

Where, after process served, the parties came to a settlement, and the plaintiff agreed to pay his own costs, but notwithstanding the attorney went on, thinking that the defendant should pay the costs, the proceedings were set aside for irregularity.

Soon after the process issued in this cause, the defendant, wishing to avoid the expense of a law suit, sent a person

to settle with the plaintiff, and a settlement was agreed to, defendant paying a small sum, giving a note for another small amount, and each party agreeing to pay his own costs. *Mr. Hall* was plaintiff's attorney—but the parties thinking, as it appeared, that *Mr. Richardson*, his partner, had the conducting of the suit, a writing to the following effect, signed by the plaintiff, was addressed to him: "Mr. Charles Richardson, barrister-at-law,—This is to certify that I have this day settled with Patrick M'Mahon, and received payment in full—part in cash, and the remainder by note of hand—any cost incurred I will pay." This receipt was, without delay, taken to *Mr. Hall*, the plaintiff's attorney, by the defendant—who thinking, as he said, that his client must have been misled when he gave it, and thinking also that the defendant should pay his costs, did not pay attention to the settlement, but proceeded with the suit, and has since filed a declaration and demanded a plea. It was not shewn that the plaintiff authorised this subsequent proceeding, or denied the settlement, or that the attorney had referred to him for information or instruction. A rule nisi having been obtained by *Cary* to set aside these proceedings, *Richardson* shewed cause.

Per Cur.—Upon the case stated we think the rule should be made absolute. It is in the power of a plaintiff to compromise, if there be no collusion to defraud the attorney; and when he does so, and undertakes to pay his own costs, his attorney has no right to proceed, in order to force the costs from the other party. The plaintiff may release his action at any time—his wish must prevail.

Per Cur.—Rule absolute.

CROOKS V. CHISHOLM AND CAMERON.

If a bond of submission contain a clause that the submission shall be made a rule of court, it is not necessary that an agreement enlarging the time should be made a rule of court as well as the submission, and it is too late to object to an award after a lapse of four terms from the publication, and an attachment granted for non-performance.

O'Reilly obtained a rule nisi to set aside the attachment, award, &c. in this cause, under the following circumstances. On the 21st August 1833, the parties entered into bonds of submission to abide by the award of Andrew Steven and

Edmund Ritchie, touching more particularly a suit brought in this court by Crooks against Chisholm, and referring (besides this) generally all causes of action, demands, &c. between *the said parties*. Award to be made by the 1st November next; and in case they should not agree then to stand to the award of Colin C. Ferrie, to be made on or before the 2nd November next—submission to be made a rule of court, pursuant to the statute; costs of the suit and of the arbitration to follow the event of the award. On the 31st January 1834, Colin C. Ferrie made an award, reciting the submission as above; and that the parties had by agreement, under their seals, dated 26th October last, agreed that the time for making *the award* should be enlarged till the 1st February; and that Steven and Ritchie had not made any award, whereby the composing of the differences had fallen wholly upon him; that he had heard the evidence of Crooks; and that the defendants, having been duly notified, had not appeared—and he published his award, that defendants should pay plaintiff 21*l.* 3*s.* 7*d.* On the 11th February 1834, a rule of court was made, reciting the submission by bond, and also the agreement annexed to the said bond, by which the defendants agreed that certain matters named should be taken into consideration; and on the same day a rule was made, on reading the agreement of the parties in the cause, for enlarging the time for making the award to the 1st day of February *last*—making that agreement a rule of court. On the 25th April 1834, copies of the award and both rules were served on defendants, in order to move for an attachment.

On the 30th April 1834, in Easter term, a rule nisi for attachment issued, returnable in Trinity, which was moved to be made absolute 25th June. On the 11th November 1834, Michaelmas term, the defendants obtained this rule, to shew cause why the attachment and award, and all proceedings subsequent to the award, should not be set aside, or why the rule of court of Hilary, 1834, making the agreement to enlarge the time for making the award a rule of court, as well as the attachment and all proceedings subsequent to that rule, should not be set aside:

1st. Because the umpire made his award *ex-parte*, in the absence of defendants and without their having had due notice of such proceeding.

2nd. Because his award is not final.

3rd. "Because the agreement for extending the time does not contain any consent that the same may be made a rule of the court.

The agreement for extending the time is as follows:—"It is agreed between the parties in this matter, that the time for making the award herein be enlarged till the 1st day of February next. Dated," &c.

Notman shewed cause this term.

ROBINSON, C. J., delivered the opinion of the court.

In regard to the merits, if it were clearly made out that the arbitrator proceeded without giving the defendant a fair chance of being heard, or that he did in any other way act unfairly, it would be clearly too late to move upon such a ground now. For such a cause, the defendants should have moved within the time limited by the statute. They could not have resisted the attachment on any such ground when it was moved in Easter term last—6 T.R. 162. Much less can the attachment now be set aside for such cause, the defendants having wholly omitted to raise the objection till Michaelmas term last, when the attachment had issued without being opposed, and had been executed on one of the defendants. Having read the affidavit however, I cannot forbear saying, in justice to the arbitrator, that however he may have judged in respect to the claims brought before him, he seems, in his proceeding, to have been actuated by a desire of doing justice between the parties, and in the steps he took I cannot but see that he is quite free from any just cause of blame; and indeed I think that his mode of proceeding seemed to have been judicious, except that in deciding he seems to have admitted the plaintiff's claims upon too slight evidence. The award is for a large sum—its justice is strenuously denied—one side only have been heard, though not as it appears from any fault of the arbitrator—the demand is an old one—and upon a view of all the affidavits, if the matter could fairly be opened again, in

consequence of any legal objection that has been taken, I should be inclined to do so.

But I think none of the objections can be properly allowed to prevail, as to the award not being final. Clearly it is final for all that appears in the award itself; and if the reservation to defendants to offer evidence in reduction of a particular charge rendered the award in reality not final, it is only by shewing matters extrinsic that the award could be impeached, and it is entirely too late to do this now. Had application been made on this ground in Hilary term last, I think the objection must have prevailed. I am of opinion, upon the third objection, that the agreement for extending the time contained no assent that it should be made a rule of court; that the case of *Evans v. Thompson*, 5 E. 189, is a decisive answer to it, and applies to this case, though the agreement here was on a separate paper, instead of being endorsed on the bond.

The cases of *Pedley v. Goddard*, and of *Lowndes v. Lowndes*, 1 T. R. 77, 1 Ea. 276, are expressly against setting aside this award or relieving against the attachment, under the circumstances of this case. If after the end of Hilary term last the defendants could be received to urge any of the objections they have now raised, they should have done so when called on to shew cause against the attachment. They are now too late. We should be acting against every rule to entertain such objections at this time. I am of opinion that this rule must be discharged with costs.

SHERWOOD and MACAULAY, J. J., concurred.

Per Cur.—Rule discharged with costs.

GOULD v. WHITE.

When personal property was taken in execution by a sheriff and afterwards abandoned by the direction of the plaintiff's attorney, and a memorandum of the suit being discharged given to the defendant, but the sheriff was afterwards directed to proceed, and sold to the plaintiff in this action, (the property in the meantime having been transferred *bona fide* by the defendant to a third party, who had left it in the possession of the defendant in this action): Held that no property passed by the sheriff's sale, as the levy had been previously abandoned, and that consequently the plaintiff could not maintain trover.

Trover for 196 bushels of wheat, tried at the last assizes for the district of Newcastle, *coram* Macaulay, J., who reported as follows:—It appeared in evidence that under a

fi. fa. against the goods and chattels of one Kimber, at the suit of Wallington, the sheriff of Newcastle, on the 20th October 1833, seized the wheat in question, being at the time in the straw, and part in the barn and part in stack, on the premises of the defendant Kimber. That other property was likewise seized, but that all had been left in the hands of Kimber, without any officer remaining in charge thereof. In November following, an arrangement was made, through Mr. Clarke of Cobourg, by which the execution was intended to be discharged, and the plaintiff in the suit was satisfied. A written discharge to the sheriff, dated 7th November, was delivered by the plaintiff's attorney to Mr. Clarke, and by him placed in the hands of Kimber, in the following terms:—"Discharge the execution in Wallington v. Kimber, on receiving your fees." Subsequently, owing to apprehension on Mr. Clarke's part that Kimber would fail to comply with the terms he had come under at the time the debt was arranged, he (Clarke) procured from the plaintiff's attorney a countermand of the discharge, dated 11th November, which was served upon the sheriff before he had notice of the discharge previously granted. It further appeared that Mr. Boswell, of Cobourg, had proposed buying this wheat of Kimber before harvest; and that after the seizure an absolute sale and delivery took place to him, and that he paid for it at different times after the delivery. It seemed that Kimber had thrashed out the wheat, and delivered it at the defendant's mill as Mr. Bennett's; the defendant's miller gave for it a receipt, dated 28th November 1833, thus: "Received of Mr. Kimber, for J. C. Boswell, 196 bushels of wheat, for chop, at J. White's mill, Hamilton." Upon the *fi. fa.* above mentioned, and which must have been returnable in Michaelmas term, the deputy sheriff, without any new writ or fresh seizure, on the 6th January sold this wheat, as being liable and in his hands under that *fi. fa.*; the plaintiff became the purchaser. The wheat was in a binn in defendant's mill, and being knocked down to the plaintiff, the sheriff proceeded to Kimber's residence to dispose of other chattels there; no earnest or part payment was given by the plaintiff, nor

did any act of delivery take place : the deputy sheriff said he considered the property to become the plaintiff's, upon its being knocked down to him, and that he might have taken possession of and secured it without any act of delivery ; considering him good for the purchase money, he did not desire to exercise a right of lien for the price. No money was ever paid the sheriff by the plaintiff, but Mr. Clarke stated that he had been paid the amount on behalf of Kimber, whose debt he had settled with Wallington ; that he had funds of the plaintiff's in his hands, against which the price of the wheat was placed, in the presence of the plaintiff, who seemed to assent, and did not dissent. Kimber was present at the sheriff's sale, and said nothing against it—but he informed the deputy sheriff before the sale that he had a discharge of the execution. The sheriff's fees were paid by Mr. Clarke, but the deputy sheriff did not admit seeing the discharge, though he did the countermand, before the sale ; it seems that Kimber kept the former in his pocket for a long time. In May or June following, the plaintiff demanded this wheat of the defendant, in order to obtain evidence of a conversion, with a view to this action. Mr. Clarke stated the settlement he assumed was at first intended to be an absolute discharge of the execution—but that Kimber failing to make promised payments, he procured the countermand in evidence, which was written at his instance and by his desire. On the defence it was objected :

1st. That the sheriff had no authority to sell on the 6th January—the execution being previously discharged and the levy abandoned, and the wheat having since become the property of another.

2nd. That no sufficient sale to transfer the property to the plaintiff had been proved, in the absence of any delivery.

3rd. That there was no sufficient proof of a conversion.

Macaulay, J., was of opinion that the last objection was without foundation. Upon the others, he thought the sheriff had abandoned the levy, and that if not, the writ had been discharged ; that the defendant was entitled to a verdict, on the ground that even if the writ subsisted, and although a

stranger might acquire a property under it, notwithstanding the discharge to Kimber, the sheriff's lien had been waived and lost—and that the wheat when sold was no longer in his possession and amenable to the process, in opposition to the rights and interest acquired by the purchaser; consequently he, the sheriff, could have made no delivery—and further, that if he could have made a delivery, none took place, nor was a valid contract to pass the property to the plaintiff otherwise in evidence. He conceived Clarke an interested witness, to a certain extent; and if his testimony were rejected, the plaintiff's case would be still weaker. He thought Clarke answerable to the plaintiff, should he fail in this suit; and that as far as his evidence went in favour of the plaintiff, it was therefore (as indirectly exonerating himself) inadmissible. He told the jury that if Mr. Boswell was in their opinion a *bona fide* purchaser, to find for the defendant; but if not—if he colluded with Kimber, with intent and design to defeat the writ, or to defraud Clark—then to find for the plaintiff, leaving the other questions to be moved in term by the defendant. Verdict for the defendant.

In Michaelmas term last, *Draper* obtained a rule nisi to set aside this verdict, and for a new trial. *Boswell* shewed cause.

ROBINSON, C. J.—The sheriff, so far as one can judge by his conduct, had abandoned the levy made by him in October. The plaintiff's attorney had given to the defendant Kimber an unqualified discharge of the execution; this entitled Kimber to dispose of the wheat, and enabled him to afford to any person desirous of purchasing satisfactory evidence of his right to sell; unless, indeed, it could be shewn that any fraud was used in obtaining that discharge, which is not pretended to have been the case. That being so, it is out of the question that Wallington or his attorney could revive the seizure and act upon it, for the purpose of divesting from the subsequent purchaser the property which he had acquired *bona fide*, upon the assurance which Wallington had enabled him to hold out—that the *fi. fa.* was discharged.

It has been decided in *Blades v. Arundell*, 1 M. & S. 711, that the sheriff, in order to maintain any action against a person for taking goods seized by him on a *fi. fa.*, must continue in actual possession of them; and of course the sheriff's vendee can acquire no property when the sheriff has not retained his authority under the writ.—1 Wils. 44; Holt, N. P. C. 335; Str. 176; 8 Price, 95; 2 Camp. 48.

SHERWOOD and MACAULAY, J. J., of the same opinion.

Per Cur.—Rule discharged.

WOOD v. SHERWOOD.

In an action of case against a sheriff for not arresting a debtor, and an averment in the declaration of the issuing of an *alias* writ of *capias ad respondendum*, to support which an *original* writ of *capias* was produced at the trial, the variance was held immaterial.

Case for negligence in not arresting one Black upon a *ca. sa.* at the suit of the present plaintiff. Wood had brought an action of trespass against Black, which was tried at the last assizes at Brockville, and a verdict for plaintiff rendered, with 75*l.* damages; and the declaration in this action alleged that a *capias* had been issued after the verdict, for the purpose of holding Black to bail for that amount—which writ had been delivered to the sheriff, and that he had arrested Black thereon. At the trial it appeared that Black was aware, even before the *capias* issued, that it was intended to arrest him, and that he took precautions to avoid it—keeping his house and threatening resistance, &c.; that the sheriff had sent an officer some days after he received the writ, who attempted to arrest Black, but returned without succeeding. Upon the whole evidence it was contended, that the sheriff had not acted with sufficient promptness on receiving the process; that he had not acted with zeal and diligence upon the occasion of the attempt made to execute it, and that the sheriff had failed in his duty in not renewing his endeavours before the return of the writ. It was a question for the jury to determine, on a view of the whole case, whether by due diligence Black might have been arrested, and whether in consequence of due diligence not having been used, the plaintiff had lost the chance of obtaining the fruits of his former verdict. Black

had absconded from the country after the attempt to arrest him, but from the evidence given respecting his circumstances, it became a question for the jury what damages, if any, Wood could be said to have sustained from the failure to make the arrest. The case went to the jury upon these points with a charge as favorable to the sheriff, in the opinion of the Chief Justice, who tried the cause, as the facts warranted. Considering the whole evidence, the Chief Justice reported he would not have felt disposed to find fault with the verdict, if the jury had found for the defendant, but he thought their finding for the plaintiff was more in accordance with the evidence; and in respect of damages, he thought the verdict was moderate and indeed lenient.

Smith, H., obtained a rule *nisi* to enter a nonsuit on an objection raised at the trial—namely, that the *capias ad res*. produced in evidence did not appear on the face of it to be an *alias capias*, issued in the former action while it was pending. It was a common original *ca. re.*, and did not therefore sustain the declaration as not being a writ issued in the cause pending, but appearing on the contrary to be the commencement of a new suit, and if really issued in the former action, it was irregular, not being an *alias*.

Sherwood, H., shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

Upon the merits of the case, I see no ground for setting aside the verdict. As to the legal objection: It was objected by the defendant's counsel at the trial that such a *capias* was irregular, and could not properly have issued in a cause after verdict, as it was averred the writ in question did, but I did not accede to the application for a nonsuit on this ground. It appears to me that the sheriff could not protect himself in this action by objecting to the regularity of the process, so long as it was not absolutely void on the face of it. The not inserting the words, "as we have before commanded you," could at most only make the process irregular, and the irregularity was one, besides, which this court would have cured by allowing an amendment, if an application had been made at any stage to set aside the process. It occurred to me at the trial that the evidence

might possibly be open to exception in another shape—namely, that the writ varied from the process stated on the record, and moreover, that no evidence was offered of a judge's order authorising the writ to issue in an action of trespass, where bailable process could not issue as a matter of course. Whatever difficulty might be presented on either of those grounds, the objections were merely technical, not applying to the merits, and I did not therefore choose to suggest any that the counsel did not insist on, especially as there was no doubt that in fact the process issued legally, because it was marked on the face of it “bail by judge's order for so much,” &c. which shewed there had been such an order made, though none was produced.—3 Will. 345; 2 Keb. 705; Cro. Jac. 280, 9; 2 Saund. 100; 10 Rep. 76; Poph. 203; Str. 993; 1 Ld. Ray. 397; 5 Mod. 413; 8 T. R. 424; 2 Sal. 700; Cro. Eliz. 466, 188; 6 Taunt. 490; 2 Mar. 186; 3 Mod. 324; Carth. 148; 1 Wils. 255; 2 Sid. 125; 1 Lev. 95; 3 T. R. 657; 1 H. Bl. 541; 1 W. Bl. 649; 6 T. R. 450; 5 T. R. 577; 2 Lev. 85; 4 T. R. 611; 2 Esp. 477; 5 Esp. 160; 5 B. & C. 339.

Having heard the argument of counsel last term, I am now of opinion that there is no reason why the verdict for the plaintiff should not stand. The objection raised at Nisi Prius on the irregularity of the *capias* ought not, I think, to have prevailed; and in respect to allowing any technical exception to the evidence upon new ground, not taken at the trial, that would not, in my opinion, be proper. The merits are really with the plaintiff; the verdict is moderate, and the case is not one in which we should give unusual facility to objections merely technical. Besides, if it had been distinctly objected at the trial that proof of a judge's order should be given, I am not sure that the endorsement on the writ would not have been sufficient evidence for that purpose.—2 Esp. N. P. C. 35; 10 B. & C. 216.

With respect to any objection on the ground of variance, I am of opinion that it ought not to prevail. The declaration, it is true, sets forth a *capias* which ought regularly to be in form an *alias capias*; that which was produced was simply a *capias*; but, on the other hand, the declaration

does not in fact say anything more than that a *capias* issued. It does not call it an *alias capias*. There was therefore in reality no variance between that averred and the one in proof, and at any rate such a variance has been determined not to be material.—Hobart, 55.

I am of opinion that the rule for a new trial must be discharged.

SHERWOOD and MACAULAY, J. J., agreed.

Per Cur.—Rule discharged.

BALDWIN ET AL. V. SLICER.

A suitor attending a Court of Requests is privileged from arrest.

The defendant moved to be discharged from arrest, on an affidavit that he had instituted a number of actions in the Court of Requests at Belleville, which were to be tried on Saturday the 7th February 1835. That on the 6th February he went to Belleville from Kingston, to attend the trial of his causes; and on the 7th, at 6 in the morning, before the court sat, was arrested on a *ca. re.* in this suit.

Per Cur.—The point seems settled that the defendant is entitled to privilege.—1 M. & S. 638. The courts give to this privilege a large and liberal construction—and it does not appear confined to Courts of Record.

The Chief Justice added, that if this privilege were confined to Courts of Record, he could not say the Court of Requests was not such a court.

Per Cur.—Rule absolute.

HEATHER ET AL. V. WALLACE.

The bonds required to be given by an absconding debtor to obtain a supersedeas to the attachments against him, must be in double the amount of the debt sworn to.

The debtor's estate having been seized upon many attachments sued out against him, some in the District Court, and others in the Court of King's Bench, *Baldwin* obtained a rule *nisi* this term for a supersedeas to the several writs, on shewing that the defendant had executed a bond with sureties to *all* the creditors jointly, in a penalty double the amount of *all* the attachments—conditioned, that if the creditors should prosecute their cases to judgment—then if

the defendant should not depart without satisfying the costs and condemnation money upon such judgments, or so much or so many of them as the value of the estate seized shall amount to, or if he shall render himself, &c., then the bond to be void.

The object of the application was to obtain the sanction of the court for giving security, which should do no more than assure to all the creditors together the value of the goods attached, instead of giving to each creditor security in the amount the law requires; by which latter course, it was suggested, the defendant is compelled, in order to get back his goods, to give security perhaps in many times their value.

ROBINSON, C. J.—I think it is consistent with the spirit of the fourth section of the statute to allow these words to be inserted after “in the value of the property or estate so taken and seised to the said claimant,” or “if so much of such property or estate as shall not have been sold under legal process to satisfy the judgment of any creditor of the said —, who may have acquired a prior right to satisfaction;” and then a bond may properly be given to each creditor in double the amount of his demand. If this cannot be done, I see no alternative but to pursue the statute strictly, and have a separate bond in double the value in each case.

MACAULAY, J.—Assuming that upon the bond proposed the obligees might bring separate actions by reason of their separate interests, I do not conceive this to be the course authorised under the statute. The defendant seems bound to give a bond to each creditor who has a legal lien by attachment on whatever property he desires to redeem.

BIGCRAFT V. CLARKE.

In justifying an arrest under mesne process of the District Court, the cause of action should be averred within the jurisdiction, and the writ shewn to be returned.

The declaration contained four counts:—The three first for false imprisonment, varying the mode of statement, the

last for a common assault. The defendant pleaded the general issue and a special plea in justification of all four counts, alleging the issue of process from the District Court of the district of Gore, and the arrest of the plaintiff under and by virtue of that process. To which there was a special demurrer, assigning for cause that it was not averred that the process issued for a cause of action happening and arising within the jurisdiction of the Gore District Court, and that it was not shewn that the writ for arresting the plaintiff was returned into the District Court. Joinder in demurrer.

The court were of opinion that when the defendant justifies under mesne process it is necessary to allege that such process was returned, and per

MACAULAY, J.—It appears to me the plea is vicious and bad on several grounds. 1st. It professes to answer several counts of the declaration without averring the trespasses to be the same, and includes an assault, battery, beating and imprisonment, (2nd) sought to be justified under a *molliter manus imposuit*, in arresting under process, which is no sufficient answer to the beating, &c. 3rd. The arrest and imprisonment under process is not alleged to form the same trespasses mentioned in the declaration. 4th. The sum for which the arrest took place being 17*l.* and upwards, the suit might or might not be within the jurisdiction of the Gore District Court, and being equivocal upon the bare amount, it ought to have been alleged that the cause of action was within such jurisdiction. 5th. Being incipient or mesne process, it would seem the return of the writ ought to have been alleged, as well in the case of the plaintiff to the suit justifying under it as of the officer under like circumstances, though upon the latter point I still entertain some doubts, and give no express opinion thereon. On the other grounds, I think judgment should be for the demurrer.—1 Chit. 7, 533; 1 Marsh, 18; Cro. El. 353, 493; 2 Str. 1049; 1 Saund. 296, n.; Hardw. 298; Ld. Ray. 231; 7 Taunt, 695; Will. 688, 14; Bull, N. P. 19; 8 T. R. 73, 299; 6 T. R. 562; 2 Saund. 5, n.; 2 T. R. 172; 3 T. R. 183; 6 T. R. 235; 1 Sal. 409; 12 Mod. 396; 10 Ea. 82; Cro. Car. 446; 1 Wil. 17; Willes, 30, 122, 528.

Leave was afterwards given to the defendant to amend, on payment of costs.

SMITH V. JUDSON.

Where the defendant purchased personal property from the plaintiff, and gave him back a mortgage on it to secure the purchase money, and agreed if default were made in the payment he would give up the property and the plaintiff should sell it to pay himself, and give the overplus, if any, to the defendant, and at the same time the defendant gave the plaintiff his promissory notes for the purchase money, which were not to be acted on if the property were given up; on default having been made, the property was given up and sold by the plaintiff for less than the mortgage money, and an action was then brought on one of the promissory notes to recover the difference: Held that it would not lie, the notes having been satisfied by the surrender of the property, according to the agreement.

This cause came before the court for judgment upon a special case made at the last assizes for the Home District. In November 1832, defendant leased of plaintiff the Lockport House, and purchased his furniture for the sum of \$3500, at the same time executing a mortgage on the same furniture in security for the payment of the \$3500. The mortgage contained an agreement that in case default was made in the payment of the \$3500, in the manner specified, plaintiff might take possession of the property and dispose of it, paying the surplus, if any after satisfying the \$3500, to defendant. Notes were also given for the amount—one for \$350, payable on demand, (on which this action was brought), and ten notes of \$315 each, payable in 3, 6, 9, 12, 18, 21, 24, 27 and 30 months.

Defendant on 23rd December 1832 left the house without any understanding with plaintiff, leaving a written memorandum that plaintiff might from that time take possession of the house and furniture, as he should have nothing more to do with it. Plaintiff then took possession of the house and furniture, and immediately advertised the mortgaged property for sale. In about ten days it was sold at auction to one Cary for \$2800.

One Beebe, in February 1833, wished to lease the Lockport House, and purchase the furniture, and offered plaintiff the same amount for the furniture that defendant was to give him, \$3,500—but plaintiff would not lease the house, and did not accept the offer for the furniture. The verdict was taken by consent, subject to the opinion of the court above

on these facts—whether it should be entered for the plaintiff or the defendant, and subject to be reduced (if the court should be of opinion that the plaintiff is only entitled to six per cent. interest on the instrument declared on) by the sum of one per cent. on the principal thereof.

The case was argued by *Baldwin* for the plaintiff, and *Bidwell* for the defendant.

The Court were of opinion that the note declared on in the action must be considered as satisfied by the receipt of the \$2,800; and that the verdict should be entered for the defendant. According to the principle contended for by the plaintiff, he would be allowed the privilege of altering the defendant's undertaking, by applying the money recovered to the payment of a portion of the debt not yet due, in order that he might sue upon the note which was due, as if it were still unpaid; but in fact that note was paid when the \$2,800 were received.

Per Cur.—Judgment for defendant.

DOE EX DEM. WEST V. HOWARD ET AL.

A continuance in possession of land, under an erroneous impression that it was their own, of intruders, as against the King, after grant made, is not a disseisin of the grantee.

Ejectment for Lot No. 24, 7th concession township of Yonge. Declaration was served before Trinity term 1834, on the tenant in possession of a lot, which he contends to be Lot No. 23 (the cause of the dispute being—that the lessor of the plaintiff maintains that the lot, of which the tenant was in possession, is not No. 23, but No. 24, and so covered by his deed). The defendants obtained leave to defend as landlords in Trinity Term last, and in their name a consent rule was filed, appearance entered and general issue pleaded on 30th June, in which rule the premises defended for was a lot called No. 23—not 24, as in the declaration. On the 5th August 1834, the defendants were served with notice of trial for the assizes at Brockville; on the 29th August, but before the trial, the defendants were informed that the plaintiff was going to sign judgment, on account of the defence being for No. 23, and not for No. 24—the land spe-

cified in the declaration. The defendants offered to go to trial on the merits of the title, but judgment was signed on the 20th August, the first day of the assizes, and a writ of possession issued.

The Court set aside the judgment without costs, and ordered that the consent rule should be amended, by specially describing the premises intended to be defended for. The consent rule to be filed within one month.

REDDEN v. McNAB.

In an affidavit for security for costs, it must be stated with certainty that the plaintiff is not resident within the jurisdiction of the court.

Defendant moved for security for costs, and it is admitted that he demanded security of the plaintiff's attorney, and gave the usual notice. He moved on an affidavit, stating that he believes the plaintiff has absconded from the province, and is not within the jurisdiction of the court. The defendant had pleaded, and the plaintiff's counsel objected that on that account the motion was too late, as the defendant knew what he now states when he pleaded.—5 T. R. 597; 5 Ea. 538.

The Court refused the application, it not being alleged with certainty that the plaintiff was not resident within the jurisdiction of the court.

In this term, HENRY BALDWIN, JOHN MILLER, ANGUS BETHUNE and JONES HUBBELL, Esquires, were called to the bar and sworn in.

J. B. ROBINSON, C. J.
L. P. SHERWOOD, J.
J. B. MACAULAY, J.

KING'S BENCH.

 EASTER TERM, 5 WILLIAM IV.

McKENZIE ET AL. V. McBEAN.

An action for goods bargained and sold cannot be maintained against a person who has become responsible for the payment of goods delivered to a third party.

Assumpsit for goods bargained and sold to the defendant, and under and by virtue of that bargain and sale delivered to one Archibald McBean, the younger, at the special instance and request of the defendant. The declaration also contained common counts for goods sold and delivered to the defendant, money counts, and an account stated. At the trial before the Chief Justice, at the last assizes for the Eastern District, it was proved that Archibald McBean, junior, the son of the defendant and an inhabitant of this province, in the lumber trade, had been for some time engaged in a course of dealing with the plaintiff, a merchant in Montreal; that he was indebted to the plaintiff in a considerable sum, and having gone to Montreal in January 1831, in order to obtain more goods, the plaintiff had declined supplying him, unless he could procure his father, the defendant in this action, to become responsible for payment. The plaintiff stated to him that he had written to the defendant to know whether he would consent, and would not let him have goods till he had received the defendant's answer, assenting to become security. At this time McBean junior left with the plaintiff the list of the goods which he had wished to get, and returned home. The plaintiff soon afterwards received an answer from the defendant, agreeing to become responsible, and then forwarded the goods to McBean junior, who received and accepted them, though in his evidence at the trial he stated that he had objected to take goods upon condition of his father being guarantee, giving as a reason that his father would charge him a considerable sum for being responsible.

This action against the defendant was brought upon the undertaking contained in his letter, which was thus :—

“Lancaster, 20th January, 1831.

“Sir,—I received your letter this very day, requesting to know whether I will hold myself responsible for one hundred and fifty pounds, which my son wishes to get of you in goods, which I will be accountable for all in the month of June next, or as soon as such lumber as may be brought to market is made sale of. So if the above conditions will answer you, I have no objections as to my part whatever.”

The defendant's counsel at the trial objected that this undertaking should have been specially declared on—that the goods were sold to McBean junior, and not to the defendant, who was liable as a guarantee upon his special undertaking.

A further objection was raised. It was proved that in the summer of 1831, McBean, jun. did take down timber to Quebec, which, upon an understanding with the plaintiff, was placed in the hands of plaintiff's mercantile agent there, to be disposed of, and the proceeds to be accounted for to the plaintiff. It was shewn that in fact the lumber was sold for more than 150*l.* and the money paid to plaintiff; but as it was paid without any special direction as to its application, the plaintiff placed it to the credit of McBean, jun. upon his *old* account, which it rather overpaid. The excess was acknowledged as payment *pro tanto* of the account of 150*l.*, and for the balance this action was brought against the defendant as guarantee. The defendant contended that upon the terms of his letter he was discharged when the proceeds of his son's timber, sufficient to cover the 150*l.* passed into the plaintiff's hands. The Chief Justice apprehended that the first objection must prevail, but reserved the point, and allowed the action to proceed. He overruled the second objection, as it did not appear there was anything which clearly took the case out of the general principle which governs the application of payments at common law—namely, that when the party paying gives no direction, it shall rest with the party receiving to place

the payment to the credit of any of several demands which he may have, according as he may choose.

Draper, in Michaelmas term, obtained a rule *nisi* to set aside the verdict and enter a nonsuit, on the point reserved.

ROBINSON, C. J.—I am of opinion that the verdict cannot be supported, and that the rule for entering a nonsuit must be made absolute. The goods were sold to the son—he was liable, undoubtedly, as the buyer, and the defendant was liable only on his undertaking as guarantee. The nature of the transaction shews this, and a letter of the son's, written in 1832, and read in evidence at the trial, proves I think that he admitted his liability. Under such circumstances, it is necessary to declare specially; and, besides this, the undertaking in the letter is special in its nature. The evidence does not support the first count, for the goods were not sold to this defendant. I have no objections however that the plaintiff, if he desires it, shall have leave to amend his declaration, in which case a new trial would be ordered instead of a nonsuit.—1 Wils. 161; 2 Camp. 215; 1 Saund. 211, n.

The other objections it will still be open to the defendant to urge, unless my brothers agree with me in opinion, and are satisfied that the defendant's letter does not necessarily imply that he was to be exonerated if the plaintiff should receive the proceeds of the lumber sent down in 1831, to to the amount of 150*l.*—Peake, N. P. C. 89; 5 Taunt. 601; 1 Ld. Ray. 286; 1 Stark, N. P. C. 153; 9 Mod. 427; 1 Merivale, 585; 2 B. & A. 39.

The general principle is clear, that the creditor has his election where the debtor gives no direction, and after some doubt I have returned to the opinion to which I inclined at the trial—that we are not warranted in placing such a construction upon the letter as would deprive the plaintiff of his election. Indeed, for all that appears, the defendant may have expected and may have intended to express the expectation that his son's raft would pay up the old debt, and produce enough besides to pay up the new credit of 150*l.*, to be given to him upon the defendant's guarantee. There would seem no good reason for the plaintiff's consent-

ing to forego satisfaction of the old debt out of the proceeds of McBean junior's timber, and to accept payment of the debt more recently contracted, and as it was not so stated in the agreement, it should not I think be inferred; however, it is not necessary to determine this point finally at present.

SHERWOOD and MACAULAY, J. J., of the same opinion.

Per Cur.—Rule absolute.

DOE EX DEM. ADKINS v. ATKINSON.

The Registry Act does not apply where there has been no previous registered deed, and since stat. 4 Will. IV. ch. 1, sec. 47, a deed of bargain and sale does not require registry nor enrolment, to make it a valid conveyance.

Ejectment for lot number 22, 2nd concession Nassagaweya. At the trial, *coram* Macaulay, J., it was proved that a patent issued in 1820 to Samuel Rykman for several lots of land, including the lot above mentioned. Rykman was a surveyor, and had taken a contract to survey the township for a compensation in land. The patent was made in confirmation of that contract. One Street had furnished the supplies, &c. to enable Rykman to make the survey, and was to receive a proportion of the lands. In 1823 or 1824, Rykman executed several deeds of lands to Street, and gave them to a person to take them to Street, and got up the agreement which he and Street had entered into. The deeds were accordingly taken to Street, and accepted by him. That witness could not state what particular lots were included in any of those deeds: some of the lands were in the Home district, and some in the district of Gore, in which district Nassagaweya is situated. The witness said that he had proved the execution of the deeds requiring to be registered in the Home district, and was to have proved those respecting lands in the district of Gore; but before he went to Street's for that purpose, Street's house and all his papers were accidentally consumed by fire. The lessor of the plaintiff claimed under a deed of conveyance from Street, made to him in July 1833; and the difficulty he was under was, to satisfy the jury that one of these lost deeds from Rykman to Street embraced this lot.

Rykman could have explained the matter; but, though his attendance was required, and an attempt was made to subpœna him on behalf of the plaintiff, he did not appear at the trial, nor was his absence accounted for. Several witnesses, however, and among them subscribing witnesses, proved that Rykman had made several deeds to Street; and one or two of the witnesses recollected that lands in Nassagaweya were included, though they could not remember the number of the lots. It was further proved, that after the fire, Street took blank printed deeds to Rykman, to obtain conveyances in the place of those which had been burnt; that Rykman promised to fill them up properly, and was paid by Street for doing so; that he did accordingly fill up a blank for the premises in question, which blank was produced in court, and proved to be filled up in his handwriting. He declined, it seemed, to execute any of the deeds after having prepared them, on account of some contract or writing, which he insisted must be first delivered up to him; but the paper produced shewed his own admission that he had before conveyed the lands now in question by the deeds which were burnt. On the defence, a deed from Rykman, to one Hyles, his son-in-law, for this same land, was produced, dated subsequently to the conveyance to Street, and registered; and it was objected, that the deed to Street being a bargain and sale, required registry to make it valid, and that it was therefore defeated by this later conveyance; and that this latter deed, having been duly registered, was, under the provisions of the Registry Act, to be preferred to the deed to Street. The jury found for the plaintiff; and in Michaelmas Term, *O'Reilly* moved to set aside this verdict and enter a nonsuit, on the points raised at the trial. *Draper* shewed cause.

ROBINSON, C. J.—Most clearly no priority of title is gained by registry of Hyles' deed, because the title to this land was not a registered title before, and on that account the second section of the Registry Act does not extend to it. And as to the objection that registry was necessary to supply the place of enrolment, in order to make the bargain and sale from Rykman to Street a valid conveyance—that objection

is precluded by the forty-seventh section of the statute 4 Wm. IV. ch. 1.

SHERWOOD, J. and MACAULAY, J. of the same opinion.

Per Cur.—Rule discharged.

DOE EX DEM. JACKSON V. WILKES.

A grant from the Crown must be by matter of record under the Great Seal, and an exemplification under the Great Seal of a grant invalid in its inception, will not have the effect of making such grant valid by relation, from its commencement.

Ejectment brought to recover possession of a small tract of land, one-fifth of an acre, in the village of Brampton. The lessor of the plaintiff proved his title by producing letters patent from the crown, granting him the premises in fee simple. The date of the patent was 5th March 1834, and upon the face of it, it appeared to be made in confirmation of a previous sale of the land to the grantor, through the Commissioner of Crown Lands, for the sum of 10*l.* 5*s.* To rebut this title the defendant produced an instrument, exemplified under the great seal of this province, of which the following is a transcript:—

[GREAT SEAL.]

UPPER CANADA.

“WILLIAM THE FOURTH, *by the Grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, &c.*

“To all to whom these presents shall come, Greeting:—

“Know ye, that amongst the rolls and records in the Secretary and Registrar's Office, in the province of Upper Canada, Lib. A. fol 8, it is thus contained:—Frederick Haldimand, Captain General and Governor-in-Chief of the province of Quebec and territories depending thereon, &c. &c. &c., General and Commander-in-Chief of his Majesty's Forces in said province, and the territories thereof, &c. &c. &c. Whereas his Majesty having been pleased to direct that in consideration of the early attachment to his cause manifested by the Mohawk Indians, and of the loss of their settlement which they thereby sustained, a convenient tract of land under his protection should be chosen as a safe and comfortable retreat for them and others of the Six Nations who have either lost their settlements within the territory of the American States, or wish to retire from them to the British; I have, at the earnest desire of many of these his faithful allies, purchased a tract of land from the Indians situated between the lakes Ontario, Erie and Huron; and I do hereby, in his Majesty's name, authorise and permit the said Mohawk Nation,

and such others of the Six Nation Indians as wish to settle in that quarter, to take possession of and settle upon the banks of the river commonly called Ouse or Grand River, running into Lake Erie, allotting to them for that purpose six miles deep from each side of the river, beginning at Lake Erie and extending in that proportion to the head of the said river—which they and their posterity are to enjoy for ever.

Given under my hand and seal at arms, at the Castle of St. Lewis, at Quebec, this 25th day of October 1784, and in the 25th year of the reign of our sovereign lord George the Third, by the grace of God of Great Britain, France and Ireland, King, Defender of the Faith, and so forth.

[Signed,] FREDERICK HALDIMAND."

Registered 26th March, 1795.

(Signed) WM. JARVIS.

By His Excellency's command.

(Signed) R. MATTHEWS.

" All which we have caused to be exemplified.

" In testimony whereof we have caused these our letters to be made patent, and the great seal of our said province to be hereunto affixed. Witness our trusty and well-beloved Sir John Colborne, K.C.B., lieutenant-governor of our said province, and major-genetal commanding our forces therein, this 28th June, 1834, and fifth year of our reign. (Signed) J. C."

It was then proved that the Six Nations Indians had enjoyed the lands described in this instrument for more than forty years; that the premises in question composed part of the tract; and that individual Indians had leased portions of the tract to different persons. There was also produced a letter, admitted to be under the signature of Mr. Goulburn, under-secretary of state for the colonies in 1816, addressed to Captain Norton, an Indian agent, in which it is stated that "there is no difficulty on the part of his Majesty's government, to admit that the grant on the Grand River, which was after the peace of 1783 made to the Five Nations and their posterity forever, is a grant as full and as binding upon the government as any other made to individual settlers."

A verdict was directed to be taken for the plaintiff, with leave for the defendant to move to enter a nonsuit if the court should be of opinion that by reason of the instrument under the hand and seal-at-arms of General Haldimand,

and the possession of the Indians under it, the King was disabled from making the grant under which the lessor of the plaintiff claims.

Draper accordingly obtained a rule nisi in Michaelmas Term last, which was argued in Hilary Term by the *Attorney-General* for the plaintiff, and *Baldwin* for the defendant.

ROBINSON, C. J.—Nothing is reported to have been given in evidence at the trial, from which it could be inferred whether the defendant was or was not in possession by privity with the Six Nations Indians, or whether they countenanced the defence and objected to this action upon the idea that the Crown had done or was attempting anything in opposition to their rights, and inconsistent with the former act of the governor of the province of Quebec, under which the Indians had originally taken possession. From what passed at the trial, there was no ground for assuming this; and upon the argument of this case last term, I considered the legal questions which have been agitated to have been raised by objections purely technical, taken by the defendant to the title of Johnson, the lessor of the plaintiff, and urged for the purpose of maintaining himself in possession without its being attempted to be shewn, and indeed without its being pretended that the Crown, in what they have latterly done, have been acting adversely to the Indians, or with a view to deprive them of any advantage they could claim under the instrument of Governor Haldimand.

The defendant shewing no privity between himself and the Six Nations Indians, and being, for all that appears, a stranger to any title that could be set up under the act of Governor Haldimand, does what any defendant in ejectment may do, generally speaking—that is, he takes whatever legal exceptions he can to the title set up for the plaintiff; and he maintains that by the instrument made by General Haldimand as governor of the province of Quebec, the King was divested of the title of the premises in question, and was disabled to make the grant which he assumed to make to the lessor of the plaintiff in 1834.

To this it is answered, that the instrument produced can have no legal operation to pass an estate from the Crown—first, because it is not under the great seal, and not matter of record; secondly, if it were indeed a patent under the great seal, it would be void for uncertainty as to the parties who are to take under it, the grant not being made to any corporate body, nor to any person by name in their natural capacity; thirdly, that no estate is conveyed by the words of the instrument, which amounts merely to a license to the six nations of Indians to enjoy the land at the pleasure of the Crown.

The defendant, on the other side, maintains, that the instrument is in fact matter of record, being made so by its being recently exemplified under the great seal; that the grantor can make title under the enrolment, and cites 3 & 4 Edw. VI. ch. 4, as it seems from the note on the instrument, as well as from the certificate exemplifying it, that it has become matter of record; that it is not indispensable, with respect to all grants from the Crown, that they should be under the great seal, for that leases may be made in England under the exchequer seal (cites Com. Dig. Patent); that in the colonies, grants from the Crown may be good, though not under the great seal, if they are sanctioned by usage in the particular colony (Chalmers' Opinions on Cases from the Colonies, vol. 1, p. 241); that it does not appear to the court that there was a great seal in use in Canada when this instrument was made (1784); and that whether a great seal was necessary to grants of land, and whether the King could only grant by record in the province of Quebec, must be decided by the laws of Canada at the time the instrument was executed—that is, by the French law in force then—and not by the law of England, which, in civil matters, was suspended by the introduction of the law of Canada under statute 14 Geo. III. c. 83.

As to the objection, that the grant is bad for uncertainty in respect to the grantor: that it is at least certain as to the Indians, who went into actual possession and lived upon it, and that it would be good as regards their interests, though there might be uncertainty as to other persons who might

claim; that the Indians were by this grant made a corporate body and enabled to take (1 Roll. 513) and hold in a corporate capacity, although no corporate name was expressly given to them. That if the grant did but give a right to hold generally, without strict legal words of inheritance, the grantor had a life interest, during the continuance of which the King could not make a grant to others; and that if the Indians or any Indians have under Governor Haldimand's grant a right to hold possession, that right must prevent any other person from recovering in ejectment, which implies a right to the immediate possession.—1 Inst. 86.

In my opinion, the case is clearly in favour of the King's right to make the patent in 1834. Upon the first objection to the instrument of Governor Haldimand—for it is impossible to adjudge, upon any legal principle or upon any authority, that such an instrument could divest the crown of an estate—it is true, that by the law of England leases may be made of lands of the crown under the seal of the Court of Exchequer, either for years or for life, because such, it is said, has been the common usage of the Court of Exchequer, “and the customs and usages of every of the King's Courts are as a law, and it would lead to great difficulty and confusion if the multitude of leases which have been so made were to be held void.”—2 Co. 16; Cro. Car. 99, 513, 528; Cro Jac. 109; Plow. 320, b.

But it is impossible to bring this case within the reason or authority of Exchequer leases of crown lands, for here neither is the great seal used nor any seal answering to that which, upon the authority cited, can be admitted as equivalent. The seal at arms of Governor Haldimand is no seal of the King, and it is not shewn that in point of fact it was ever pretended in any other case to dispose of crown lands by an instrument under the seal at arms of the Governor of Quebec. Again, this instrument does not profess in its terms to be a lease for years or for life; but if it be meant to convey any legal estate, it clearly was not intended to limit such estate to the life of the grantee. The general principle is clear, that no grant of the King is avail-

able or pleadable unless under the great seal, and it is equally clear that this case cannot be brought within the principle relied upon.—Com. Dig. Patent C. 2; 2 Roll. 182, l. 5. The laws of Canada were spoken of in the argument. It was not shewn, that according to those laws the Governor of a colony, acting in the name of the King, could under his own seal at arms grant away the lands of the crown; but it is not important to discuss this point, for the question must be resolved by the laws of England, and not by the French law as it prevailed in Canada upon the division of the Province of Quebec. King George the Third, in the royal proclamation of 1763, introduced the law of England into the newly conquered country, and the same proclamation, in speaking of grants of land to be made in the Province of Quebec, uses the term *patent*; and no doubt, according to the law of England, it could only be by patent that lands could be granted. It is true that before 1784, when this instrument was made, the statute 14 Geo. III. c. 83, intervened, which enacted that thereafter, “in all matters of controversy relative to property and civil rights, resort shall be had to the laws of Canada, as the rule of decision of the same.” But if it were otherwise clear, that under this form of words the laws of Canada could be considered as introduced in such a manner as to apply to the exercise of the King’s prerogative in granting lands, binding his Majesty by whatever laws the French King had been bound, which I do not at present assent to, yet the ninth clause of the statute prevents such an application of the previous words, for it expressly declares, “that nothing in this Act contained shall extend, or be construed to extend, to any lands that have been granted by his Majesty or shall thereafter be granted by his Majesty, his heirs and successors, to be holden in free and common soccage.” If without this clause the application of the laws of Canada would be extended to make valid this instrument of Governor Haldimand, which otherwise would convey no interest, it is clear that the ninth clause would prevent the laws of Canada from being so extended as to defeat the subsequent grant in free and common soccage, which has been made to Jackson, the lessor of the plaintiff.

We are thrown upon the law of England for the decision of this question, and by that law (and I imagine, not less by the laws of Canada,) it is plain no estate has been created in crown lands by this grant, if it can be so called, which Governor Haldimand has assumed to make of them under his seal at arms. The want of the great seal is in my opinion fatal. It has been argued that the recent exemplification of this instrument, under the great seal of the province, has made it matter of record, but the question is, whether, when the patent was issued to Jackson in March 1834, the King was or was not seised of the land? That he was so seised is plain, unless the instrument under Governor Haldimand's seal at arms had divested his Majesty of the estate. If that instrument could only derive validity from its being exemplified under the great seal, then the exemplification came too late, for clearly the principle upon which the enrolment of a bargain and sale may have an effect retrospectively, cannot apply in such a case, for no estate passed under that instrument at the time of its execution.—Com. Dig. Confirmation D. 5. But there can be nothing in this argument, in any view of it. The principle is—that the King can neither grant nor take an estate, but by matter of record. In respect to titles made to the King, the question of the necessity of the great seal does not occur, and it is sufficient to shew that the conveyance is by matter of record; but with respect to grants made by the King, the question is not merely whether the instrument of conveyance can or cannot be made out to be matter of record; the grant must be shewn to have been made under the great seal, and the exemplification under the great seal of an instrument in itself insufficient for the purpose, cannot change the nature of the instrument.

The 3 & 4 Edw. VI. ch. 4, was referred to—but nothing can be clearer than that that statute and the 13 Eliz. ch. 6, explaining it, can have no such effect as to make the exemplification of an instrument, which is not a patent, supply the place of a patent. It proves the very contrary, for it shews that no patent existed. Those statutes do nothing more than enable persons claiming by force of any patents

made to them, to make title by the enrolment of such patent. Enrolling an instrument such as that produced, I take to be merely a nugatory act. Whatever may have been the intention of the Colonial Government of Quebec at the time the instrument was made, which, as far as has been shewn to us, is without precedent ; it is impossible to give it effect, as divesting the King of his estate, without admitting that Governor Haldimand, under his hand and seal of arms, could have alienated all the Crown lands in the province without the intervention of those forms which are necessary to the perfecting of a patent, and which are designed to afford protection both to the crown and the subject.

It is not necessary to enter into a particular consideration of what might be the legal operation of this instrument, supposing it to have been made in such a manner as to be binding on the crown ; I must say, however, that the letter which was produced, under the signature of Mr. Goulburn, can have no effect on the judgment of this court upon the legal construction or effect of this act of Governor Haldimand. It states very openly and candidly what effect the Government are willing to concede to it, so far as their rights and the rights of the Indians are concerned, and would be a very strong document in support of the Indians if anything had been since done by the Government inconsistent with the frank avowal contained in that letter. But it is not pretended that anything has been done at all at variance with the sentiments then expressed by the under secretary of state, or repugnant to the wishes or rights of the Six Nations. The defendant, I repeat, has shewn no priority between himself and the Six Nations, and, for all that appears, the necessity for this ejectment against the defendant may as probably have arisen in consequence of measures taken by the crown in concert with the Indians, and for their interest and protection, as from an opposite cause.

Though my opinion is given upon the insufficient nature of the instrument produced, separate from its contents, I have not failed to consider the question raised with respect to the uncertainty of the grantees that are to take, and the

nature of the interests intended to be passed. At present I consider that the instrument cannot be held to convey any legal estate, for the want of a certain designation of any person or persons to take as grantees.—1 Co. 50; Dyer, p. 170; Co. Lit. 3, a.; 10 Co. 26, b. I do not think that a patent in the form of this instrument would have created a corporation consisting of “the Mohawk Nation and such other of the Six Nations Indians as wish to settle on the tract of land described;” and unless it can have that effect, as there are no persons particularly named, there cannot be said to be properly any grantees; and it is, at any rate, out of the question to contend that an instrument under the seal at arms of a colonial governor can constitute a legal charter erecting a corporation. The most that can be made of the instrument issued by Governor Haldimand is this, in my opinion—it may be considered as a declaration by the King’s Governor, and in the King’s name, that certain lands of the crown were held by the King for the exclusive use and enjoyment of the Six Nations. As it conveyed no legal title, not being under the great seal, and not being made to any persons in their natural capacity, or to a body corporate, and contains no legal words of inheritance, it is impossible to say the King did not continue fully seised in fee of the premises, or that in a court of law any greater effect could be ascribed to such an instrument than that of a license to possess during the King’s pleasure, which pleasure would be determined by the King’s death or by the patent subsequently issued; and so long as the right of possession continued unaffected by any determination of the King’s will, the King, as the possessor of the legal title, could of course assert that title against a stranger, for it might very well be that the ejectment might be necessary for the very purpose of protecting the Indians in the exclusive possession which had been promised to them; so that the grant made to the lessor of the plaintiff may be no infringement of any equity between the crown and the Six Nations, and to allow of an ejectment against the defendant, who appears in no other light than a stranger, involves no opposition to legal principles, since if the crown had

made no recent grant, and had continued seised as trustee for the use of the Indians, (admitting that to be possible in law), the King could have asserted that legal title even against the *cestui qui trust*, and much more against a stranger.—Com. Dig. Grant G. 3; Hard. 443; 8 T. R. 118.

I am of opinion, on these grounds, that the verdict for the plaintiff should stand; and if this question which has been raised here were to be decided according to the laws of Canada, and not by the law of England, it has not been shewn that the result would be otherwise. We have ascertained that there was a great seal in use in the Province of Quebec in 1784, when the instrument of General Haldimand bears date; that grants of land, of which few were made by the British government before the year 1795, were made by letters patent under the great seal, and that it has been uniformly held in the courts of Lower Canada that grants of the waste lands of the crown could not be made in any other manner. Before the conquest, it appears that no seal was held to be necessary in grants from the French crown. The Governor and Intendant were enabled to grant jointly, but their grant was not effectual until it was ratified by the King of France; and it may reasonably therefore be inferred that such an instrument as this before us could not have availed under the French-Canadian law to possess any interest beyond that of a mere license of occupation.

I repeat, however, that such a question as this, arising here or in Lower Canada, is not to be decided by the laws in force at the time of the conquest, but upon the principles of the common law of England, which, in respect to the prerogative of the King in granting the lands of the crown, continued to be in force after the passing of the 14 Geo. III. ch. 83, as well as before.

SHERWOOD and MACAULAY, J. J., of the same opinion.

Per Cur.—Postea to the plaintiff.

MCBRIDE ET AL. V. PARNELL.

Where a father, intending in the distribution of his property to give his son a hundred acres of land, was induced by the son to exchange that land for the property of a stranger, the father paying 125*l.* for such exchange, and the son promising to repay it, so that it might go in the distribution to the rest of the family, and the father then, for a nominal consideration, conveyed to the son the land received in exchange: Held that the executors of the father might maintain an action against the son for the 125*l.* as money paid to his use, that they were not estopped by the consideration stated in the deed, and that it was not for an interest in lands within the Statute of Frauds.

Assumpsit.—The declaration contains counts for a mesuage, &c. sold by testator, work and labour, goods sold, money lent, money paid, money had and received, interest, and an account stated, all by and with testator. Plea, non assumpsit. At the trial at the last assizes for the Niagara District, *coram* Macaulay, J., it appeared in evidence that by an indenture of bargain and sale, dated 14th October 1829, for the expressed consideration of five shillings, payment of which was admitted in the deed and by receipt indorsed, the testator conveyed to the defendant (his son) 196 acres of land in Grantham, being portions of three or four lots, worth 400*l.* It was represented verbally by the witnesses that these premises had been previously obtained by the testator from one Pawling, upon an exchange of other land and the payment of 125*l.* or 150*l.* difference, and that his inducement for so doing was to oblige the defendant, to whom it was intended to be assigned instead of the estate conveyed to Pawling in exchange, which had been designed for the defendant. That the defendant wishing the Pawling farm, as being more extensive, importuned the testator to effect the exchange, and promised to answer for the difference advanced. That about five years ago, and after the delivery of the aforesaid deed, the defendant told one of the witnesses that he had agreed to pay the testator \$600, having received that much more than his share by the said deed. That this sum was to be paid to equalize the portions of other members of the family. This witness understood from the defendant that the testator had paid \$500 to effect the exchange, which he admitted to owe him, having received the property. Another witness said the defendant told him he had to pay \$500, which the testator had advanced to Pawling in the exchange; that the defendant

had then recently received a conveyance of the estate, and was to reimburse the testator that amount. Afterwards the witness stated the defendant to have said he was to pay the money to testator or his (defendant's) two younger sisters, if the testator did not require it of him. Another witness gave evidence tending to prove defendant's admission of his liability to pay the \$500, and represented that his brothers only received one hundred acres of land each—such admission having preceded the conveyance to defendant—and that the defendant obtained an excess of land above the rest owing to the exchange with Pawling, and was in consideration thereof to repay the testator's advances. This witness said he had no doubt the money would have been paid had the testator lived, and that he understood securities were to have been given, but they had been refused or lost sight of after the execution of the deed to defendant.

On the defence it was objected,—1st. That the evidence shews, if anything, an agreement, contract or sale of lands, and that the plaintiffs are estopped by testator's deed from denying the payment of the consideration. 2d. That such contract should be proved in writing. 3rd. That the defendant's subsequent admission was in the alternative to pay the testator or his sisters, and that the plaintiffs could not recover thereon.

It was said, in reply, that the evidence proved the money to have been paid at the defendant's request, and for his use and benefit.

Macaulay, J. charged the jury that he thought the evidence sufficient to prove a promise to pay after the deed to defendant, and before the promise to testator, founded upon a sufficient consideration to sustain the action as upon an account stated. The jury found for the plaintiff, and 125*l.* damages.

Dickson obtained a rule *nisi* last Michaelmas term to set aside the verdict and enter a nonsuit on the objection raised at the trial. *Sullivan* shewed cause.

ROBINSON, C. J.—Upon the evidence, I think defendant liable upon his promise to pay testator the sum he admitted ; and it may be justly held that the father advanced the money

for him, and became merely the medium of acquiring the land for his benefit, and that the receipt on the deed cannot extinguish the debt for the money expended for his use. The plaintiff's evidence is uncontradicted—upon that evidence the justice of the case is clearly on the side of the verdict, and I see no legal objection to the plaintiff's recovery. In my opinion, the transaction is not properly to be regarded as a bargain and sale of the land between the testator and this defendant, his son; so that the objection that the receipt for the consideration money indorsed on the deed estops these plaintiffs as claiming anything as still due, does not apply. The defendant was one of several children, to each of whom their father, the testator, intended to give one hundred acres of land as their portion. The farm in question belonging to a neighbour, Mr. Pawling, contained more than one hundred acres, and was of greater value than the defendant had an expectation of receiving in the distribution of the property—to obtain it, the testator gave in exchange one hundred acres, which was to have been defendant's portion, and five hundred dollars; but this difference the defendant admitted to several witnesses he was to make good to the testator, in order that the proposed equality of distribution might be preserved. The testator paid the money to Pawling, procured the deed to himself, and then transferred the land to his son. He did not sell the land to his son—he bought it for him, and then conveyed it to him, charging him neither more nor less than the difference he had to pay in procuring it, and not upon any bargain having reference to the actual value. The consideration stated in the deed from testator to defendant is merely nominal—5s. It is true that the testator having the title in his own name, might have sold the land to defendant as to a stranger, or might have conveyed it to any one else, but he did not—on the contrary, he merely effected an exchange for his son's benefit, and upon the terms understood before and admitted after the transaction was closed, that the defendant should repay to his father the \$500 he had advanced. The case does not, in my opinion, come within the Statute of Fraud. The plaintiffs have no

occasion to sue upon an executory agreement concerning an interest in lands—they merely call upon the defendant to repay money advanced for him, and they prove what I think would enable them to recover upon an account stated. The consideration is executed, and is certainly sufficient to support the assumpsit.

Vide—Jenk. 166 ; 2 Taunt. 14 ; 5 B. & C. 606 ; 3 D. & R. 99 ; 1 B. & C. 704 ; 1 Esp. 172 ; Skin. 113 ; 9 Mod. 87 ; 1 Vern. 159, 383 ; 2 Vern. 427 ; 3 C. & P. 170 ; 2 B. & B. 99 ; 6 Moore, 119 ; 5 Taunt. 36 ; 5 T. R. 603 ; 13 Ea. 249 ; Eq. Ca. Ab. 48 ; 5 M. & S. 65.

SHERWOOD and MACAULAY, J. J. concurred.

Per Cur.—Rule discharged.

WOODRUFF V. GLASSFORD.

One of several defendants in assumpsit, who has paid the whole amount of the damages under an execution, is entitled to recover contribution from the other defendants, and in an action for such contribution, the regularity of the judgment in the original action cannot be questioned, and it is not necessary to shew any notice of the execution, nor demand of the money before action brought.

Assumpsit brought by plaintiff (who was one of several defendants in an action brought by Ward) against Glassford, another of such defendants, for contribution. Judgment in the former suit was entered in August 1828 against Woodruff, Glassford and seven others, among whom was one Parker. These defendants were joint owners of a steamboat, the engine for which had been furnished by Ward, and the action was brought for the value of that engine, or rather for the price agreed to be paid for it. Parker was omitted in the process, but the cause being referred to arbitration, Parker's name was included in the reference and in the award, and so became included in the judgment. It was proved that a *fi. fa.* issued on the judgment, upon which 860*l.* 7*s.*, being for debt, interest, costs and sheriff's fees, were levied from Woodruff, the plaintiff in this cause, who paid the amount in November 1831, and interest being calculated upon that sum to the period of trial, the plaintiff claimed one-ninth from Glassford, as one of the nine defendants in the original cause, being 112*l.* 15*s.* 10*d.*

Upon the trial the defendant took several exceptions :— 1st. That the judgment varied from the process in the original cause, the former not including Parker's name ; 2nd. That no authority was proved for enforcing the execution, Ward having given no such authority, and McMullan, who was proved by *viva voce* evidence only to have taken an assignment of the judgment from Ward, did not by such evidence shew sufficiently his interest in the judgment or his right to authorise any proceedings under it ; 3rd. That no demand was proved to have been made upon the defendant before action brought, and no notice by plaintiff to him before he paid the execution. Macaulay, J., who tried the cause, overruled these objections, as the plaintiff had a verdict at the last assizes for the Niagara District.

In Michaelmas term last *Sherwood* obtained a rule *nisi* to set aside this verdict and for a new trial, verdict being against law and for misdirection. *Dickson* shewed cause.

ROBINSON, C. J.—I think the objections were all rightly overruled at the trial, for clearly the judgment must be regarded as regular till it is set aside, and the execution is in accordance with it. If Parker allowed himself to be included in the reference, when he need not have been, it was so far favorable to the defendant, as it increased the number of persons liable to contribute, and lessened the proportion to be paid by him ; at any rate, we can go no further than the judgment, and cannot discuss its regularity in this action. As to the second point—the execution under which this money was levied is lost, but the time of its issuing and the tenor of it are proved. Of course Woodruff had no knowledge under what authority it issued—it was enforced against him—his goods were levied upon, and he was compelled to pay. No collusion on his part was shewn, and the evidence leaves I think no solid ground in point of fact for objection on this head. It is proved that persons not parties to this judgment had paid the money to Ward, upon an agreement with him and some of the proprietors of the boat, and that the execution was enforced in order to reimburse them. It is true that the assignment of the judgment to these third parties was not proved—it was

only spoken of; but McMullan & Co. and McPherson having paid the money to Ward, was sufficient to shew their interest in enforcing the judgment. The taking the assignment was proper in point of prudence and on their own account, but not necessary to be shewn here, in order to establish the right to proceed on the execution in Ward's name. As to the third objection—that notice should have been given to defendant by Woodruff before he paid the money on the execution, and that a demand should have been made before action brought, there is no room for contending that such proof was necessary here. In an action by a surety against his principal, or by a co-surety against another for contribution, notice is necessary to be shewn, but here they were co-defendants in an action, and the judgment immediately and directly affects them all equally, and all had an opportunity of making a defence. As to demanding contribution before action brought, I think it was unnecessary. It is a plain case of money paid by one man on account of another, and bringing an action to recover it back is a sufficient demand. It was argued on the part of the defendant that the bubble acts 6 Geo. I. ch. 18, and 14 Geo. II. ch. 37, rendered this association of persons, as owners of the steamboat, an illegal association, because they raised stock in shares which were transferable; but I am of opinion that these statutes, when they were in force, never extended to an association of this description, which is indeed nothing more than the common case of every company of shipowners; and indeed this is so obvious on a perusal of these statutes, that I need add nothing more on this head, or cite the modern cases in which the objects of the 6 Geo. I. ch. 18, have been considered and explained.

There were two other objections started at the argument in term, but I am not sure whether they were taken at the trial. It has been urged that this defendant is not liable for contribution alone, but that the other eight defendants should have been sued jointly with him; and further, that plaintiff and defendant being partners (joint owners of the steamboat), the one could not sue the other upon a matter connected with their joint interests. These objections were

fully answered in the argument. If it were true that the defendant could not be sued alone for contribution, he should have pleaded in abatement, but in truth there never was any room for the objection; and as to the other point, the parties were not co-partners—they were simply joint owners of a chattel, or rather tenants in common, each having a distinct though undivided share. Upon the merits of the case I see nothing that should prevent the plaintiff's recovering. Undoubtedly this defendant was liable to pay one-ninth the judgment obtained by Ward—he has paid nothing; admitting that two other defendants in this suit have paid their share, the remainder has been paid by this plaintiff, and indeed, in point of fact, he has been made to pay the whole judgment, as if no defendant had paid anything; whether he has been made to do this rightly or not, is not examinable in this cause—that depends upon whether the two defendants alluded to, Campbell and Mervin, paid their money as defendants on account of the judgment, finally and without reserve, or merely as contributors with others, not parties to the judgment, to satisfy Ward at the time, looking as well as they did to have the money thus *advanced*, not *paid*, returned to them out of the first earnings of the boat. But in the meantime, to say the least, Woodruff has paid the shares of all the other defendants, and among them Mr. Glassford's, and there is no pretence why he should not recover in this action.

SHERWOOD and MACAULAY, J. J. concurred.

Per Cur.—Postea to the plaintiff.

BANK OF UPPER CANADA V. BOULTON AND COVERT.

Debt on bond against two defendants, conditioned that A. as a bank agent should account as often as he should be called upon. Pleas, that before action brought A. ceased to be agent, and that while he was agent he kept all the clauses, &c. in the condition; secondly, that A. paid the plaintiff the amount of the penalty in the bond: Held bad on general demurrer, the first plea not answering the condition, and the second not being pleaded as accord and satisfaction, nor any release shewn.

Debt on bond.—Defendants pleaded severally, cravingoyer, and setting out the condition of the bond, which is as follows:—"Whereas James Gray Bethune has been appointed agent of the Bank of Upper Canada at Cobourg,

in the said district of Newcastle, and hath been required by the President and Directors thereof to give good and sufficient security for the due performance of his duty. Now, the condition of the above written obligation is such, that if the said James Gray Bethune shall and do, and to the best of his skill and understanding demean himself as agent of the said bank, and shall and do, as often as he shall be required by the President and Directors thereof, render a true, just and full account of all the bills, notes monies and other things committed to his charge as such agent as aforesaid, together with all interest and profits arising therefrom, and paid to him by such person or persons as shall from time to time transact business with him as agent for the said bank, and shall in all things obey and observe the instructions which shall from time to time be transmitted to him by the President and Directors of the said Bank of Upper Canada touching or concerning the business by them confided to his charge, then this obligation shall be void—otherwise to remain in full force and virtue.”

The defendant Covert pleaded, 1st—*non est factum*, and 2nd—a special plea, on which issue was joined; and he pleaded six other special pleas, to which the plaintiffs demurred generally. His 3rd plea states that Bethune, after the making of the bond, and before action brought, ceased to be agent of the Bank, and during all the time that he was agent of the Bank, he did well and truly observe all the articles and conditions to be performed by him, &c. according to the condition of the bond. 4th. That before action brought, Bethune paid to the plaintiffs the said sum of 2,000*l.* in the said writing obligatory mentioned. 5th. That before the commencement of the suit, Bethune paid to the said plaintiffs, &c. as in the last plea, with this difference, that in the 4th plea the day of payment (21st January, 1834) is laid after a *scilicet*; in this plea it is laid absolutely on the 31st January 1834. 6th. That before the commencement of this suit Bethune paid to the plaintiffs the sum of 1755*l.* 9*s.* 3*d.* in full payment and discharge of the clauses, tiffs have not at any time since the making of the said writing obligatory and the condition thereof, hitherto been

in anywise damnified by reason or means of any matter, cause or thing in the said condition mentioned. 8th. *Actio non*—because if the said plaintiffs have been damnified for or by reason or means or on account of any matter, cause or thing in the said conditions of the said writing obligatory mentioned, the said plaintiffs have been so damnified of their own wrong and through their own means and default. The defendant Boulton, craving oyer, pleaded *non est fact.* and eight special pleas. To the 2nd and 4th the plaintiffs replied, and an issue in fact was raised on them; to the 3rd, 5th, 6th, 7th, 8th and 9th plaintiffs demurred generally. The 3rd plea is similar to that of the defendant Covert; the 5th is the same as Covert's 4th plea; the 6th is the same as Covert's 5th plea; the 7th *actio non*, because before action brought the said J. G. Bethune paid to the said plaintiffs the said sum of 1735*l.* 9*s.* 3*d.*, and the said plaintiffs accepted the same in full payment and discharge of the clauses, conditions, agreements, matters and things in the said condition, &c. mentioned; the 8th plea is the same as Covert's 7th plea; the 9th plea is the same as Covert's 8th plea.

These demurrers were argued in Hilary term last by *Sullivan* for the plaintiff and *D. Bethune* for the defendant.

ROBINSON, C. J.—It is perfectly clear, in respect to all the pleas demurred to, except the 4th and 5th of the defendant Covert, and the 5th and 6th of the defendant Boulton, that the plaintiffs are entitled to succeed, and upon those also I have come to the same conclusion, though not so readily. The third plea of each defendant is the same in substance and form, and is undoubtedly bad. The evident intention of such a condition must be that the officer appointed shall discharge his duty faithfully while he continues an officer; and in respect to paying over and account—conditions, agreements, matters and things in the said conditions of the said writing obligatory mentioned, to wit, at York aforesaid. 7th. *Actio non*—because the said plaintiff for monies, that he shall not only comply with this part of his duty during his service, but that when his service is at an end he shall render an account of any monies received

by him while in service, and shall pay over such monies. To take a condition in any other form would be absurd indeed, for if the officer by his misconduct should compel his employers to discharge him, or even if he should without cause abandon their service, he might decline to render any account or to pay over any monies formerly received, and they would be without remedy against the surety. To be sure a condition might be framed in explicit terms, so as to lead to this absurd consequence, but the court would reluctantly give way to such a construction, unless the language was so plain to that effect that it would admit of no other construction. Here it is quite otherwise. The condition is that the officer shall, as often as he shall be thereunto required, render a true account, &c. and there are no words saying he may not be called upon when out of office to account for what he did while in office. This plea is no answer to the declaration, looking as we must at the condition set out on oyer. It was probably not intended to rely on this plea. The authorities cited do not in the slightest degree maintain it. *Liverpool Water Works v. Atkinson* (6 Ea. 510), which bears most upon the question, is clearly inapplicable. It only decides that where a bond is given that a clerk shall serve faithfully for twelve months, and duly account for all monies that he shall receive in such service, the sureties in such a bond are not responsible for any monies received by him after the twelve months, if he should continue to serve. It decides what could not be doubted, that in this case, if Mr. Bethune, after he ceased to be agent, had received monies for the bank, these defendants would not have been responsible for such monies. The 6th plea of the defendant Covert and 7th plea of the defendant Boulton were admitted in argument to be bad. The 7th and 8th pleas of defendant Covert and 8th and 9th of defendant Boulton cannot be supported. This is not an indemnity bond. It becomes absolute if the agent has failed in any point of duty, and the plaintiffs would be entitled to recover without proving any substantial damage; for instance, if he failed to render an account, or should disobey an order, though no pecuniary loss should follow.

The case of *Holmes v. Rhodes* (1 B.& P. 640) is a much stronger case than the present in favour of such a plea, from the terms of the condition, but it was there held not to be pleadable.— *Carth.* 375.

The 4th and 5th pleas of defendant Covert and 5th and 6th pleas of defendant Boulton remain to be considered. There is no reason why either of the defendants should have pleaded this defence in more than one plea, for the two pleas which each has pleaded are in substance and form the same, except that a different day is stated in which the 2000*l.* is alleged to have been paid. The defence advanced in these pleas is—that before action brought the said James G. Bethune paid to the said plaintiffs the said sum of 2000*l.* in the said writing obligatory mentioned. It requires more consideration to form an opinion upon these pleas than upon the others, for they are without precedent, and no authority can be cited which is applicable in terms. None, I am convinced, can be adduced in support of them. According to a general principle of pleading, the averments or matter of a plea are to be taken most strongly against the party pleading, and for obvious reasons. Now it is not stated in these pleas whether the 2000*l.* was paid before or after breach of the condition; we must therefore consider, if the distinction would be material in deciding the question, that the payment might have been made before forfeiture of the condition as well as after, and then see how the defence could be supported in that case. Accord and satisfaction before breach of the condition, it is held, cannot be pleaded in bar to an action of debt on the bond, but we need not look particularly into this, for it is not accord and satisfaction that is pleaded here. The alleged payment cannot have been intended to be pleaded by way of accord and satisfaction, for nothing is said of accord, nor is it alleged that Bethune paid the 2000*l.* in satisfaction of the bond, or that the plaintiffs accepted it in satisfaction; and both of these statements are necessary and are matter of substance.—3 *Ea.* 252; *Str.* 23, 173.

Either, therefore, the defence advanced must be considered good as a plea of payment of the penalty of the bond, or

it cannot be supported. The averment is simply, that after making the bond, and before action brought, the said J. G. Bethune paid to the plaintiff the said sum of 2,000*l.* in the said writing obligatory mentioned. It was objected in argument that payment or satisfaction by a stranger could not at all events avail. If this were after breach, and the plea were that J. G. Bethune, after breach, paid the sum of 2,000*l.*, the penalty, in full satisfaction of the condition, I do not at present think that any objection would lie to the plea on the ground of Bethune's want of authority to make the payment. I do not consider him a stranger to the condition, and it cannot be said here, as in the case cited, that the person paying or making satisfaction "was a mere stranger, and in no sort privy to the condition of the obligation."—Cro. Eliz. 541; *vide* 1 Pothier, 330. On the contrary, though not directly a party to the bond, he is materially concerned in the condition; the responsibility of the obligors was undertaken on his account, and whatever they may have eventually to pay in consequence, he is legally liable to make good. But apart from this objection, the plea is in my opinion wholly insufficient. This is a bond, with a condition to do a collateral thing—namely, to serve faithfully, render a true account, &c. If before breach such a bond can be discharged otherwise than by a sealed release, or an acknowledgment under seal that it is discharged, is the first question. That it could not be so discharged by accord and satisfaction, seems to be held by the authorities cited; and if it could, still we are to consider that accord and satisfaction is not pleaded.—9 Co. 79; 5 Mod. 86; 6 Co. 43; Cro. Jac. 254; 2 Wils. 86; 2 W. Bl. 1190; Willes, 283; Cro. Eliz. 46; 5 Co. 43.

Then, can a bond with such a condition be discharged before breach, by payment of the penalty? In reason, I should think it might, provided it were pleaded that the penalty was paid and accepted in full satisfaction and discharge of the bond, and the cases in Bl. Rep. and Willes would seem in principle to favour this conclusion, but the strict rules of law as laid down in the older cases, cited and recognised in modern authorities, are against it.—*Vide*

7 Ea. 151; 1 Esp. N. P. 256; Selw. N. P. 564. And however this may be, I am clear that we cannot regard the mere statement in the plea—that J. G. Bethune paid the *said* sum of 2,000*l.* in the *said* obligation mentioned as equivalent to an averment that it was paid and accepted in satisfaction and discharge of the bond. I do not say that even such a plea, or anything short of a discharge under seal, would in such a case suffice—but the plea as it is cannot possibly be a bar. Payment at the day of a sum secured by a bond with condition, is of course a bar, and payment before the day is of course made equally so, by being pleaded as payment at the day, and so treated in evidence; but in a bond of this kind, to do a collateral thing, there could be nothing to be paid before breach—there was nothing due. No *debitum in præsentē solvendum in futuro*, as in the case of a money bond, before the day of payment. The obligees were not bound to take any sum of money, even beyond the penalty, and give up their security for the good conduct of their agent.

If, therefore, 2,000*l.* was paid them, under such circumstances, it was not payment of a debt due, and could not of itself operate in discharge of the bond. It might, to be sure, be accepted in discharge if the obligees chose; but if it had been, and if the payment so accepted had been pleaded by way of accord and satisfaction of the bond, and whether that could have been a bar without an acquittance under seal, would have remained a question; and I apprehend that when the money paid cannot be pleaded to have been paid in discharge of money due by the bond—nothing but a sealed acquittance applying to the bond itself will be a bar. But I am convinced that these pleas can be supported by no principle or authority, and that there must be judgment for the plaintiff on all the demurrers.—See 2 Adol & Ellis, 623.

SHERWOOD and MACAULAY, J. J. concurred.

Per Cur.—Judgment for the plaintiff on demurrer.

BANK OF UPPER CANADA V. DONALD BETHUNE.

The Bubble Acts 6 Geo. I. ch. 18, and 14 Geo. II. are not in force in this province, and Banks chartered by Acts of the Provincial Parliament could not come within the provisions of those Acts.

Assumpsit by the plaintiffs, as indorsers of certain promissory notes, against defendant as maker. The plaintiffs sue as a corporation, under the name given them by the act of the Provincial Legislature, which is their charter. Pleas :—1st. General issue. 2nd. That the plaintiffs are associated illegally for a purpose prohibited by the statute 14 G. II. ch. 37; and that the notes sued on were obtained and received by the plaintiffs in their pretended business of banking, contrary to that statute. 3rd. Usury in the discounting of the note. Issue was joined on the first and third pleas, and to the other there was a general demurrer and joinder in demurrer; and the case was argued in Hilary term last by *Sherwood H.* for the defendant, and *Sullivan* for the plaintiffs.

ROBINSON, C. J.—The defendant is sued on a promissory note made by him in favour of James G. Bethune or order, and indorsed to the plaintiffs, who bring their action as indorsees in their corporate name of “The President, Directors and Company of the Bank of Upper Canada,” given to them by our provincial statute which constitutes their charter. The defendant pleads a special plea, designed, I take it, to set up as a defence that the plaintiffs have associated illegally for a purpose prohibited by 14 Geo. II. ch. 37, and cannot legally sue in a corporate capacity or upon a cause of action derived in a course of dealing which that statute has declared shall be illegal and void, making those who are concerned in it liable to be prosecuted for nuisance, and subjecting them upon conviction to the penalties of *præmunire*. I say the plea was designed, I take it for granted, to set forth this defence, but I do not say that it does so in terms, for it does not in any part of it identify the plaintiffs in this action with the persons concerned in the supposed illegal association, but leaves that to be inferred—a defect which was noticed in the argument, but which, in my opinion, it is not material to consider.

I consider that the statute 6 Geo. I. ch. 18, upon which alone the defence could be legally rested, if it were possible to maintain it, is no longer in force in this province; and further, that while it was in force an institution, such as the Bank of Upper Canada, founded upon an act of the legislature, assented to by his Majesty, was not within its provisions. The defendant's plea does not allude to 6 Geo. I. but rests wholly upon 14 Geo. II. On analyzing the latter statute it is perfectly clear that, independent of the penal enactments of the 6 Geo. I., which are expressly recited in it, it contains no prohibition which can be applied to the Bank of Upper Canada. If the 6 Geo. I. ch. 18, were in force in this province, and if the Bank of Upper Canada were an association or scheme such as came within it, it would necessarily be illegal, because in contravention of that statute; but if there is nothing in that statute extending to it, it is clear it would not be prohibited by the 14 Geo. II. ch. 37. An analysis of the two statutes will make this clear.

The 6 Geo. I. ch. 18, the first Bubble Act, (beginning at clause 18), recites, that several undertakings and schemes had lately before that time been contrived and practised, or attempted to be practised in London, &c., and in Ireland and other his Majesty's dominions, which manifestly tended to the common grievance, prejudice and inconvenience of great numbers of his Majesty's subjects in their trade and commerce, and that the persons who continued or attempted such mischievous undertakings, under the false pretence of the public good, did presume, according to their own devices and schemes, to open books for public subscriptions, and draw in many unwary persons to subscribe therein, &c. which dangerous and mischievous undertakings and projects related to several fisheries and other affairs, wherein the trade, &c. and welfare of his Majesty's subjects, or great numbers of them, were concerned or interested; and that in many cases the said undertakers or subscribers had presumed to act as if they were corporate bodies, and had pretended to make their shares in stocks transferable or assignable, without any legal authority either by act of par-

liament or by charter from the crown for so doing; and that in some cases the undertakers or subscribers had acted or pretended to act under some charter or charters formerly granted by the crown for some particular or special purpose therein expressed, but hath used or pretended to use the said charter for the purpose of raising joint stocks and for making transfers or assignments, or pretended transfers or assignments, for their own private lucre, which was never intended by the said charters respectively; and had sometimes acted under obsolete charters forfeited by non use, &c.; and that many other unwarrantable practices, too many to enumerate, had been and daily were and might thereafter be continued, set on foot or proceeded upon, to the ruin and destruction of his Majesty's subjects, if a timely remedy be not provided; and that it had become absolutely necessary that all public undertakings and attempts, tending to the common grievance, prejudice and inconvenience of his Majesty's subjects in general, or great numbers of them, in their trade, commerce and other lawful affairs, should be effectually suppressed and restrained for the future by suitable punishment: "Now, for suppressing such mischievous undertakings and attempts, and for preventing the like in future, be it enacted, &c. that all and every the undertakings and attempts described as aforesaid, and all other public undertakings and attempts, tending to the common grievance, prejudice and inconvenience of his Majesty's subjects, or great numbers of them, in their trade, commerce and other lawful affairs, and all public subscriptions, receipts, payments, assignments, transfers, pretended assignments and transfers, and all other matters and things whatsoever for furthering, countenancing or proceeding in any such undertaking or attempt, and more particularly the acting or presuming to act as a corporate body or bodies, the raising or pretending to raise transferable stock, the transferring or pretending to transfer any share in such stock without legal authority, either by act of parliament or by any charter from the crown, to warrant any such acting, transferring, &c.; and all acting, &c. under a charter formerly granted from the crown for particular or special

purposes therein expressed, by using the same charter for raising a capital stock, or for making transfers or assignments not intended by such charter, &c.; and all acting under obsolete charters or charters forfeited, &c. shall for ever be deemed to be illegal and void, and shall not be practised or in anywise put in execution." 19th section makes all such attempts public nuisance, and besides the ordinary punishment of misdemeanors, shall incur the penalties of *præmunire*. This clause closely and strictly corresponds, as to its objects, with the former clause, carefully extending them just so far and no further.

14 Geo. II. ch. 37, recites the former act, and "whereas persons have presumed to publish in America a scheme for supplying a pretended want of a medium in trade, by setting up a bank on land security, &c. and sundry other schemes, societies, partnerships or companies have been or may be set on foot for the purpose of raising public stocks or banks, and unlawfully issuing large quantities of notes or bills there, contrary to the true intent and meaning of the said recited act, (6 Geo. I.), and it is doubted whether that act doth extend to or can be executed in his Majesty's plantations, &c. in America, &c. regard that the informations, actions, &c. therein provided for, were appointed by that act to be heard and determined at Westminster, or in Edinburgh or Dublin."

It is declared and enacted that the provisions of that act did, do and shall extend to all and every the public extravagant and unwarrantable practices hereinbefore mentioned and described (that is all in 6 Geo. I. and those described in 14 Geo. II.), and that all and every the undertakings, matters and things in the said recited act mentioned or described, and prohibited to be acted, done, attempted, endeavoured or proceeded upon, and all other the undertakings, attempts, &c. hereinbefore mentioned or described, are and shall be deemed to be illegal and void, &c.

Thus it is clear that parliament, in passing the 14 Geo. II. ch. 37, did nothing more than this:—they recited that certain mischievous schemes had lately been acted upon in the colonies, which are described, and which are wholly

different in their nature from the Bank of Upper Canada, and from any other Bank established by legislative authority, issuing notes under certain legal restrictions, payable on demand and in money. The mischievous schemes described are set forth as being in their nature within the prohibitions contained in 6 Geo. I. ch. 18, and clearly illegal; and it is declared that that statute was meant to extend to the colonies, but that it could not be carried fully into execution, because the informations and actions given by the statute were required to be heard and determined at Westminster, Dublin or Edinburgh, and were not triable in the courts of the colonies. To remove this obstacle to the 6 Geo. I. being carried into effect, the 14 Geo. II. was passed, conferring jurisdiction in such matters upon the colonial courts, and thus opening the way to the practical operation of the former statute.

As the object which induced the legislature to give attention to the subject was the setting up the mischievous and dangerous banking schemes set forth in the recital; these are expressly declared to be illegal in the statute, and in such terms as that if there could have been any doubt before as to their coming under the penalties of the 6 Geo. I. c. 18, the latter statute left it no longer doubtful.

I repeat, however, that neither the Bank of Upper Canada, nor any other bank so constituted, can be brought under the description of schemes which are specifically set forth and prohibited in 14 Geo. II. The plea attempts, as it appears to me, to make out the bank in question to be illegal, by bringing it within the general words of the 14 Geo. II. which immediately follows the declaration in respect to the banking schemes described, for it states that the 14 Geo. II. ch. 37, enacts that "all other the undertakings, attempts, matters and things thereinbefore mentioned or described, should be deemed to be illegal and void in His Majesty's dominions, &c. in America." Then it avers that certain persons unknown (not stating them to be the same persons who are now suing under the name of "the President, Directors and Company of the Bank of Upper Canada") did unlawfully attempt to act as a body corporate, and to trans-

act business as a Bank legally authorised; and that as such pretended bankers, and under pretence of being legally authorised so to act, they issued large quantities of illegal and pretended bank notes, &c., and that in the course of such business this promissory note sued on was delivered to them." Now, what undertaking, attempts, &c. were made void by the statute, under the general words recited in this plea—"all other the undertakings, attempts, &c. thereinbefore mentioned?" If we look at 14 Geo. II. we shall see it was any schemes, companies, sureties or partnerships (besides such delusive and extraordinary banking schemes as it recites) which may have been or may (after the statute) be set on foot in America, for the purpose of raising public stocks or banks, and unlawfully issuing large quantities of notes or bills, then contrary to *the true intent and meaning of the said recited act*, 6 Geo. I.—not *all* companies for raising public stocks—not *all* banks issuing notes or bills—but such and such only as raised stocks *unlawfully*, or issued bills *contrary to the statute* 6 Geo. I.

The whole meaning and extent of the statute is to provide for punishing what the 6 Geo. I. prohibited, and nothing more; and if there could be any doubt whether the fraudulent and delusive banking schemes described come within the statute 6 Geo. I., it removes that doubt, and positively makes them illegal; but for everything else it relies upon and is inseparably connected with the 6 Geo. I.

In my opinion, therefore, if 6 Geo. I. is not in force in this province, there is nothing in 14 Geo. II. ch. 37, standing alone and independent, which can render illegal the Bank of Upper Canada, or any company or undertaking not like those described in 14 Geo. II.

My opinion is, that the 6 Geo. I. has not been in force in this province since the repeal of that statute by the Imperial Parliament, in their act of 6 Geo. IV. ch. 91. While it was in force, I think it derived its obligations in the colonies first and principally from the very words of the statute itself. It was passed in order that its provisions might extend not merely to London and other parts of the kingdom, but also to Ireland and "*other his Majesty's dominions.*" It was in

force in the colonies by the same act of legislative authority, and its obligation rested on the same foundation in the colonies as in England. The 14 Geo. II. recognizes this, and declares it to be and to have been so, and proceeds to remove doubts, and to remedy an obstruction which had existed to its being carried into execution. When therefore the legislature, in 6 Geo. IV., determined it to be expedient that the statute 6 Geo. I. ch. 18, or rather those clauses of it which are now in question, should be repealed, and that the several undertakings, attempts, &c. therein prohibited, should be left to be dealt with according to the common law, they did, in my opinion, absolve the application of that statute as plainly and as fully in the colonies as in other parts of the empire where it had been in force. Of course that must be the effect, unless some statute passed in England or in this colony since 6 Geo. I. ch. 18, prevents it. The 14 Geo. II. ch. 37, cannot, as I think, have that effect. It was never anything but a mere supplement to 6 Geo. I. *Omne accessorium sequitur suum principale*. The latter statute has nothing to stand upon, if the former has been withdrawn. Then we must next consider the effect of 14 Geo. III. ch. 83, s. 11, introducing the criminal law of England into the Province of Quebec, and of our provincial statute 40 Geo. III. ch. 1, declaring that the criminal law of England, as it stood on the 17th September, 1792, shall be the criminal law of this province. Neither of those enactments, in my opinion, were intended to affect, or can properly be construed to affect, the question whether the 6 Geo. I. ch. 18, is now in force in this province.

By the 14 Geo. III. ch. 83, the British Parliament clearly designed to give to Canada the criminal law of England, as to those objects and in those matters for which no special provision had before been made by parliament. That statute had no intended reference to acts of parliament which from these very terms already were as much in force in the colonies as in England, and which consequently required no introduction at that period. It left those special laws as they stood. Upon any other principle, if there had been particular penal statutes then in force, applying solely

and exclusively to the colonies, and forming no part of the law of England, we must have held such statutes to be virtually repealed by the 14 Geo. III. ch. 83, s. 11, giving us the criminal law of England, though clearly such an effect never could have been intended. The 6 Geo. I. ch. 18, and 14 Geo. II. ch. 37, were not peculiarly the law of England—they did not come to us as introduced by the 14 Geo. III. ch. 83—they were part of the criminal law of England and of the other colonies before, and they continued to be so, upon the same ground and no other, after the 14 Geo. III. was passed as before.

Then, as to our statute 40 Geo. III. ch. 1, the point is still more clear. Our colonial legislature, when they passed that act, must be taken to have been using their discretion and choice, in introducing the criminal law of England in the whole or in part, with or without exception, as they judged best. Now they had at that time no discretion to exercise in regard to these acts—6 Geo. I. ch. 18, and 14 Geo. II. ch. 37—because they already formed part of our penal law, being expressly made to extend to this and other colonies by a power beyond that of the provincial legislature. If they had desired to except them, they could not have done it, and therefore it cannot follow that because they did not except them they adopted them; they were not legislating with any view to laws already in force, under a power superior to their own. If they had excluded them, the exclusion would have been illegal; if they had introduced them, their declaration to that effect would have been idle and nugatory. I understand the provincial legislature to have left them as they found them standing, upon their own original foundation, which they had no power to strengthen or weaken; and when the parliament of the mother country repealed the original and principal act of 6 Geo. I., declaring that it was expedient to leave such practices and schemes to be dealt with according to the common law, they did, in my opinion, undo all that they had done by that statute, and they neither meant to leave it in force nor did leave it in force, in any one part of the British dominions more than in any other.

I have explained my views thus fully, because the question is one of general importance, not because it was necessary for the purpose of deciding upon this plea, for as I have already stated the plea does not state a case within the statute. If we may entertain the presumption that there is more than one association of persons in this province carrying on the business of banking under the name used by the plaintiffs in this action, then the plea would be bad, inasmuch as it does not state that the plaintiffs in this action composed the institution complained of as illegal. If we are not to entertain the presumption that there were two or more companies of persons using the corporate name of President, Directors and Company of the Bank of Upper Canada, then we must judicially notice that *the* President, Directors and Company of the Bank of Upper Canada are incorporated by a charter conferred by an act of the legislature of the province—to which his Majesty's assent, given by an act in his privy council, has been proclaimed by an instrument under the great seal of the province. Such an instrument, created by such authority, I have no hesitation in saying was not prohibited by 6 Geo. I. ch. 18, or by 14 Geo. II. ch. 37. It comes within no specification of an illegal institution described in either of those statutes; and to bring it under the general words—"all other undertakings, &c. tending to the common grievance, prejudice and inconvenience of his Majesty's subjects, or great numbers of them, in their trade, commerce and other lawful affairs"—it is necessary to charge that the project, &c. did tend to the common grievance, prejudice, &c.; the legality or illegality of the institution would depend upon the truth or untruth of that averment, as proved at the trial of the issue of fact that might be raised on such a plea. Here the plea charges nothing of the kind, nor does it in my opinion describe an undertaking such as must necessarily be illegal under either of the statutes. To make a plea under these statutes good, it must state such a case as would be sufficient to support a conviction for nuisance if the party were indicted, which certainly cannot be said of this plea. The Bubble Acts are levelled at voluntary asso-

ciations of individuals under false pretences of public good, presuming, according to their own devices, to draw in unwary persons; against dangerous and mischievous projects of persons presuming to act as if they were corporate bodies, pretending to create transferable stock without any legal authority, by act of parliament or by charter from the crown; and if there are any other projects of a like nature, tending manifestly to the prejudice, grievance, &c. of the public, the statutes are intended likewise to suppress them. Now the President, Directors and Company of the Bank of Upper Canada, if we must assume that there is but one such body, made use of no *false pretences*—they *presumed* nothing, *pretended* nothing, *contrived* nothing—they *drew in no one*—they did not proceed according to their *own devices*—they did not pretend merely to act *as if they were a body corporate*. They *are* a body corporate, *created* by a *public act*, to which the King has assented. This act was equivalent to an act of the British parliament, because the colonial legislature have power to pass it under the 31 Geo. III. ch. 31. The inducement to the statute was the *public good* moving the legislature. The association was contrived and the foundation was laid *by the legislature*. The company are composed of persons who are united by the legislature to carry the provisions of a public act of parliament into effect, and who are not shewn to have done anything not expressly authorised by act of parliament. If under the Bubble Act such an association can be held to be illegal, then it must equally follow that, upon a criminal prosecution, the parties who have carried into effect the provisions of one of the public acts of the provincial legislature may be convicted of committing a public nuisance in doing so, and as the punishment of a *præmunire* is incurred, they would be to liable lose their lands and goods, and to be put out of the King's protection, like outlaws, for conforming to an act to which the King has assented by a formal declaration under the great seal. This is repugnant to reason.

My opinion upon this plea is—that the statute on which it was supposed to rest is not now in force in this province, and that if it were, the plea does not bring the case within

it; and if we are to look out of the plea, and decide upon it by what we individually know of the institution of the Bank of Upper Canada, the plea would not be helped by it, because that corporation is not such as the statute 6 Geo. I. prohibits.

SHERWOOD, J. and MACAULAY, J. agreed in opinion, that the plea could not be sustained.

Per Cur.—Judgment for plaintiffs on demurrer.

BARRETT V. RAPELJE, ESQ. SHERIFF.

Where A. being indebted to B. and C., and being insolvent, was about to leave the country, but desired to secure to B. the debt he owed him, and instructed his clerk to that effect, who after A.'s departure made an assignment of his goods to B., without B.'s knowledge or consent. and before B.'s assent was received, the goods were seized by a sheriff under an attachment issued at the suit of C.: *Held* that the sale to B. was not complete until his assent was received, and that the Sheriff having seized the goods before such assent, could not be treated as a trespasser.

Trespass against the Sheriff of London for seizing personal property to the value of 226*l.* 12*s.* 5*d.*, alleged to belong to the plaintiff at the time of such seizure. One Asabel Beach, a merchant in the London District, became insolvent, and was then indebted to plaintiff and to one Fisher, who both resided in Montreal. Beach preferred the plaintiff to his other creditor, and in order to pay him made out an account, stating a number of articles of merchandize, affixed a specific price to each of them, and then delivered the goods to a stranger, who at the time had no authority to act for the plaintiff, either special in the transaction or generally as agent. When the articles were so delivered the plaintiff was in Montreal, and had no intimation of what had been done till some time afterwards. The account made out against the plaintiff was headed in the following manner:—“Mr. Joseph Barrett bought of A. Beach.” At the foot of the account was written—“Received payment by application in your account,” and signed by Beach. Immediately after this delivery and before the plaintiff had assented to the arrangement, John Fisher, the other creditor, came into the district of London and caused a warrant of attachment to be sued out against the property of Beach, who had previously absconded, and the defendant seized the goods by virtue of the warrant. The plaintiff then

brought his action and obtained a verdict, subject to the opinion of this court, whether the legal property vested in him by the delivery of the goods to a stranger, the plaintiff being then wholly ignorant of the proposed sale. Barrett's (the plaintiff's) acquiescence in the sale was not received from Lower Canada till after the seizure by the sheriff which is the trespass complained of in this action. Macaulay, J., who tried the cause, charged the jury to consider whether the assignment to the stranger (as for Barrett) was *bona fide*, or merely colorable to evade the attachment, and they found for plaintiff. A rule *nisi* for a new trial having been obtained, the case was argued in Hilary term last by *Tiffany* for plaintiff, and *O'Reilly* for defendant.

ROBINSON, C. J. (after stating the case).—We must assume, as the jury have found for the plaintiff, they were satisfied the assignment was *bona fide*. The clerk of Beach swore it was not a feigned transaction, but meant to be an actual transfer, and intended to change the property. It was acknowledged by him that the object was to pay Barrett's debt rather than Fisher's, against whose attachment he and Stephens, as agent for Barrett, were anxious to guard. It is a material feature in the case, that the goods were never removed from Beach's shop, in consequence of the assignment, but remained on the shelves, not packed separately, (except some articles), and were apparently part of the assortment from which Beach's clerk continued to sell to customers. This clerk however swore that he did not in the interval sell any of the goods included in the list of merchandize assigned to Stephens for Barrett. This however was a circumstance for the jury to consider—the possession continuing as before was a mark of fraud only, not conclusive evidence of it. But supposing Beach's clerk and Stephens were in earnest in what they did—that their object was really to prefer Barrett as a creditor, by assigning these goods to him in payment, and not merely to make a colorable transfer, for the purpose of covering the property in case of need, and to be used or not, according as the proceedings of the creditors should make it advisable; sup-

posing, I say, that the jury have rightly found that these acts and intentions were honest and *bona fide*, and not collusive or feigned, it still remains to be considered—1st. What may be the legal effect of a transfer made as this was, for the circumstances are attended with several peculiarities. The owner of the goods absconds, leaving a clerk or agent in charge of his shop. There is evidence that he admitted his being indebted to Fisher and others as well as to the plaintiff, but it is said he shewed an inclination to prefer the plaintiff. I see no proof on the notes that any express authority was given to the clerk to make an assignment of these goods in gross to pay a previous debt. Beach is merely proved to have said, that if anything was left, or if it should be in the clerk's power, he should like Barrett to be paid, and he tells him to take Abraham Beach's (Beach's brother) advice, and abide by it. This clerk swears, that on talking with Abraham Beach, he thought he had better make sale to Barrett, then in Montreal, who knew nothing of the intention. He then sent to Stephens, who was no agent of Barrett, and he being aware of Fisher's attachment and talking of it, the clerk made a list of 225*l.* worth of Beach's goods, and signs a receipt at the foot for that sum, as received from Stephens, on account of Barrett, for the transfer of those goods. The clerk said he thought he was not in this exceeding his instructions. We must judge whether he did go beyond his authority or not. I confess I see no evidence clearly and expressly sanctioning what he did—he shews no power of attorney to act as a general agent—the conversations he relates are vague—he was to pay Barrett if he should have anything left, and to take his brother's advice. Upon this kind of authority, however, knowing that the sheriff was coming to attach the goods, he sends to a man, who it is admitted had no right whatever to represent Barrett, and makes an assignment of 235*l.* worth of goods for Barrett's benefit. Of course if he could do this through the intervention of a person who had no authority from Barrett, he could have done it as well without the intervention of such a person, and by having a bill of sale ready to execute in case of need, he could, upon

the approach of an attachment or execution, put his hand to it, and thereby by his own act and assent merely shift the property to a person resident in another country. Stephens had no means of knowing, nor any authority for deciding, whether Barrett would accept these goods at the prices charged, and acquit Beach of so much of his debt. Barrett might have had security from others or a mortgage on land, and might not be willing to take this wholesale assignment of goods at Bowman's prices. Such a transaction implies a bargain—the assent of two minds, and Stephens had no authority to assent. Again, a voluntary assignment, that is for no consideration, would not have done here—it would have been void as against the other creditors. It was indeed not intended to be voluntary; but how was the price paid, or by what valid agreement was a price agreed to be paid? Stephens had no authority to say that Barrett would relinquish his debt or any part of it as a consideration for these goods. It is very true that before this attachment reached the sheriff, Beach, if he remained, might have defeated it, by actually assigning his goods to any other creditor who might be at hand, and who might agree to accept them in discharge of his debt; and it is true also, that no greater injury would be done to Fisher by the transfer that is set up here than would be done in such a case. But nevertheless, it is important, I think, to see that if a creditor's remedy may be defeated by a preference given to another or by a *bona fide* sale for a good consideration, the act by which he loses his remedy should be a perfect and conclusive act. If a transfer of the property can be effected, and is effected in a manner that the law recognizes as valid, there is no help for it, and it must be submitted to; but we must be careful not to give facilities to such arrangements by dispensing with any of the necessary formality of contracts.

Upon my view of the case, I think the consent of Barrett was not to be presumed, and that the sale was not complete till it was ascertained; and I do not think the sheriff coming in during the interval was to suspend his proceeding till it was known whether Barrett would agree to take

these goods and give up his debts. If he had done so, he could have had no assurance that in the mean time the goods would not have been disposed of or eloigned. Proceeding as it seems to me he had a right to do, he seized the goods, and he cannot, in my opinion, be made a trespasser by relation, because some time after he had seized them Barrett signified his assent to take the assignment. I think the sheriff must stand or fall in this action of trespass according to the facts as they stood at the time of the seizure. Had it been a gift—a mere matter of bounty—not interfering with the rights or interests of third persons, or had the goods been conveyed to trustees by Beach to sell and pay the proceeds in money to any one or more creditors, it would have been good, though the creditor in whose favour the trust was created knew nothing of the act at the time. The reason is good ; no person it is supposed will ever disaffirm an act which must be for his benefit, by which he must gain something and can lose nothing ; but here it cannot be taken for granted that Barrett stood ready at any time to take Beach's stock of goods at his own prices and discharge him of so much of his debt. If he had been otherwise secured, for instance, or was satisfied Beach could be made to pay, it would be folly. I think this distinction is plainly drawn by the court in the celebrated cases of *Taylor ex dem. Atkins v. Hood*, in which the case of *Thompson v. Leach* is remarked upon. Such a transfer as this is not complete at once, subject only to be defeated by dissent. It requires confirmation ; and I take it to be a settled principle, that “ a confirmation shall not have relation to the prejudice of another ;” and certainly not so as to make a sheriff a trespasser. The sheriff could not tell whether Barrett would assent or not, and in my opinion he had a right to act on the facts as they stood, if the sale was not then absolute and perfect, and could not be made a trespasser by any election to be declared afterwards.—*Burr. 123 ; 3 Lev. 284 ; 3 Mod. 300 ; Burr. 37 ; Dyer, 49, a. ; 1 T. R. 479 ; 2 Saund. 47, (n.) ; 3 Co. 26 ; 2 Salk. 618 ; 2 Leon. 30, 89.*

SHERWOOD, J. (after stating the case).—I think the property under such circumstances was not changed, and that the defendant had a right to seize it under the warrant of attachment. A contract for sale and purchase is an agreement for the conveyance of property from one individual to another, in consideration of an equivalent actually paid or intended to be paid by the vendee. Mutual consent is therefore requisite to the creation of such a contract, and it can only become binding when an offer is made on one side and accepted on the other.—3 T. R. 148, 193; 4 Bing. 653. Had there ever been an agreement between the plaintiff and Beach for the sale and purchase of the goods, I think the facts of the case prove it would not have been rated under the 17th section of the Statute of Frauds, because there was no delivery of any part of the goods to the plaintiff, no earnest paid by him, and no memorandum in writing signed by himself or his agent, and the price of the goods exceeded 10*l.* sterling. In every point of view, therefore, I think there was no sale to the plaintiff. I am of opinion the defendant should have a new trial, without costs.

MACAULAY, J. agreed.

Per Cur.—Rule absolute for new trial.

BREAKENRIDGE V. KING.

In dower a plea of non-tenure is not necessarily a plea in abatement, and it may be pleaded either to part or to the whole of the lands demanded, and where a plea states that the husband devised certain lands to the demandant in bar and satisfaction of dower, and that she agreed to the devise, it is sufficient, without setting out the words of the devise, *aliter*, where the devise is not in express terms in bar of dower.

Dower *unde nitrhil habet*, brought by Anne Breakenridge, widow of James Breakenridge deceased, against the defendant King, as tenant, to recover her dower (and damages for the detention) in lot No. 19, fourth concession of Elizabethtown. The tenant pleaded—1st. Non-tenure of all the premises in which dower is demanded, except of two equal undivided thirds, the whole into three equal parts to be divided of and in the rear part of the south-west half of the said lot number 19, in the fourth concession of Elizabethtown aforesaid, being the remainder of the said south-west half after taking therefrom ninety acres of the front thereof;

of the residue he pleaded that he is not nor at the time of the commencement of this suit, or at any time thereafter, was tenant thereof or of any part thereof. 2ndly. He pleaded as to the portion for which he did not disclaim, that during the coverture, to wit, on, &c. James Breakenridge was seised in fee of certain other lands, particularly described in the plea, and by his last will duly executed, devised to the said Anne Breakenridge, in full bar and satisfaction of her dower, a certain portion of the said land (stated in the pleas), to hold to her during her life; that after making this will the said James Breakenridge died without revoking it, &c. seised of the said premises, &c. after whose death the said Anne Breakenridge agreed to and ratified the said devise.

To these pleas the demandant demurred generally, and the demurrer was argued in Hilary term last, by *Sherwood* for demandant and *Bidwell* for tenant.

ROBINSON, C. J.—On the argument the first plea has been excepted to on the ground that non-tenure is a plea in abatement, and that the tenant when he disclaimed for part should have stated who was tenant for that part, in order that the demandant might have her remedy against the person liable. It was further urged, that the tenant should have averred in express terms that he was not tenant *of the freehold*, not merely that he was not tenant. The second plea was excepted to on the ground that the very words of the devise relied upon should have been set out, in order that the court might see whether the land was in fact devised in lieu of dower, and that this plea assumes merely to state the legal effect of the devise, not its tenor.

We are of opinion that the tenant is entitled to judgment on both the pleas. It appears to be settled that non-tenure is not necessarily to be regarded as a plea in abatement, and that it may be pleaded either in part or the whole, without the tenant naming any other person who is tenant, and the precedents are so.—2 Saund. 446, n. ; 3 Chit. Pl.

And in respect to the second plea, the very authorities cited by the counsel for the demandant are decisive in support of the plea, for they shew the distinction to be that

when the devise does not declare in express terms that the estate devised is in lieu and satisfaction of dower, then it shall not be averred to be so, but the very tenor of the devise must be set out, that the court may see what was intended. Here the plea states that the husband devised certain lands to this demandant in *full bar* and satisfaction of *her dower*, and further, that after his death she agreed to and ratified the devise. There is no pretence for excepting to this plea.—Dyer, 220 ; Com. Dig. 2 G. 13, 15.

SHERWOOD and MACAULAY, J. J., of the same opinion.

Per Cur.—Judgment against the demurrer.

FERRIS V. DYER AND McDONALD, ONE, &c.

In trespass for false imprisonment, a plea justifying under process of an inferior court, which had been set aside for irregularity on the terms of no action being brought, cannot be sustained.

Trespass for assault and false imprisonment.—The defendants, after the general issue and one special, pleaded that plaintiff ought not *further* to have or maintain his action, &c. because they say that *before the said term* when, &c. a *ca. re.* was issued out of the Niagara District Court, on 18th January, 1834, (the said court then and still being holden at Niagara, and *having power and jurisdiction to issue the said writ*), directed to the Sheriff of Niagara, commanding the sheriff to take plaintiff, &c. to answer to the said Dyer and McDonald in a plea of trespass on the case upon promises, which writ was duly endorsed for bail for ten pounds, and was delivered so endorsed by defendants to the Sheriff of Niagara, by virtue whereof the sheriff arrested plaintiff, and although defendants admit that the arrest so made by the writ was set aside by rule of the said Niagara District Court, yet the said rule of court so granted to the plaintiff, *the said court having power and jurisdiction to make such rule*, did by the rule restrain the plaintiff from bringing any action, and the defendants aver that the trespasses in the *declaration* mentioned are the same as the said court by the said rule *restrained* the plaintiff from *prosecuting*, the said court having at the said time competent power and jurisdiction to make such order, *quæ sunt eadem*, &c. To this there was a demurrer and joinder in demurrer.

ROBINSON, C. J.—I think the plea bad, and that the plaintiff should have judgment. It is clear that though the officer may justify under process which has been vacated for irregularity, neither the party nor his attorney can.—15 Ea. 614; 2 Bl. Rep. 846; Cow. 20, 406. Then the setting aside the arrest here left the party without the means of pleading a justification, and he relies upon his being protected from an action by the rule of court restraining the plaintiff from trying any action. Without drawing any distinction from the court said to have made such an order, being an inferior court, not competent to restrain any party from seeking redress in this court for a wrong done to him, it is manifest a rule of this court could not be so pleaded in bar in an action in the same court. The court never assumes the power to order that no action shall be brought. They grant the rule for setting aside the arrest frequently, only upon the condition that the defendant shall bring no action; the defendant by taking the rule assents to the terms; and if after such a rule the defendant should bring trespass, contrary to the undertaking, the court upon application would stay proceedings. I do not imagine any precedent can be found for pleading this conditional rule and assent of the defendants in bar of any action afterwards brought by him; but here a rule of an inferior court is pleaded in bar to an action in this court, and it is not even averred to have been a rule made with the assent of the plaintiff in this cause, but it is pleaded as the peremptory order of the court, depriving the party of the remedy given by the law of the land.—*Vide* 1 Chit. Rep. 134, 282; 4 M. & S. 361.

SHERWOOD, J., of the same opinion.

MACAULAY, J.—The District Court had no power to enforce such a restriction without the assent of the plaintiff, which does not appear. It is not unusual in this court to set aside irregular arrests under process, on condition only that no action shall be brought; in which cases the party relieved from arrest is only allowed that advantage upon his coming under terms not to bring any action. And when a suit is afterwards instituted contrary thereto, the proper course would seem to be to apply to the court upon

motion to stay proceedings, as being contrary to the assent and good faith. The court can make no rule to restrain a party against his will, though it may decline to annul an arrest without it; and when adopted by such consent, this rule, I apprehend, could not be pleaded in bar of the trespass, unless it could be regarded admissible as an estoppel, which I question. When however the arrest is set aside, and a defendant in trespass justifies under process *prima facie* sufficient—the plaintiff may reply that the arrest was suspended, though the process remained, and so shew that the legality of the act no longer remained—that the arrest was not under the writ, but *de injuria*; for when the arrest is set aside, it is in effect declaring that the arrest in fact was in itself wrongful, and not under or authorised by the writ.—T. Ray. 73; 3 T. R. 183; 10 B. & C. 202; 2 Sid. 125; 1 Lev. 99; 1 Str. 509; 3 Wils. 378; 1 Sid. 271; 9 Ea. 341; 2 Stark, N. P. C. 404; 2 Taunt. 480; 7 Bing. 676.

Per Cur.—Judgment for plaintiff on demurrer.

GRANT V. EXECUTORS OF McINTOSH.

The court refused to allow judgment to be entered on a cognovit more than fifteen years old, where although it was sworn that a large debt was due, yet it appeared that the plaintiff accepted from the defendant an assignment of property and given a discharge of the action, although the property proved unproductive.

Bidwell moved for leave to enter judgment upon the cognovit given in this cause, and to sue out execution and also to change the plaintiff's attorney. An affidavit was filed that 2757*l.* 6*s.* 9*d.* was due with interest from the date of the cognovit, which was more than fifteen years old. On shewing cause, it appeared by affidavit that judgment was rendered for the same; that in 1819 or 1820 the plaintiff took from defendants an assignment of all the rent and personal estate, debts, &c. of the estate, in discharge of this debt, but the plaintiff assented this assignment had turned out unproductive. The plaintiff also admitted that his attorney, on receiving an assignment, gave a discharge of this debt.

Per Cur.—As the matter is now before us, we cannot allow judgment to be entered on this cognovit.

Rule discharged.

FOWKE V. FOTHERGILL.

Where in debt on bond conditioned that "the defendant, his heirs and assigns should permit and suffer the plaintiff to cut down, take and carry away all the fire-wood from certain lands, without let, hinderance or molestation," the defendant pleaded that he always permitted, and the plaintiff replied that after the making of the bond the defendant conveyed the land in fee to a stranger, who would not permit the plaintiff to cut the wood, &c. and the defendant demurred to the replication, the court gave judgment for the demurrer, the replication having shewn no breach, the bond being a license under seal binding on the defendant and his vendee, and not revocable by parol, and the plaintiff having shewn no obstruction.

Debt on bond, dated 3rd February, 1829.—Condition shewn in oyer was—"if defendant, his heirs or assigns should permit and allow, without any let, hinderance or molestation whatsoever, the plaintiff, his heirs or assigns, to cut down, take and carry away all the wood for firing from off fifteen acres at the north-west corner of No. 12, first concession of Hope, to be measured off and marked by defendant, so as to occasion no mistake as to the boundary thereof; provided always, and it being understood that the said wood should be taken and carried away within five years from date, the land and the use thereof continuing to be the property of defendant, his heirs or assigns, then," &c.

Pleas—1st. *Non est factum*.

2nd. *Actio non*—Because defendant hath always since the said obligation permitted and allowed, without any let, hinderance or molestation whatsoever, the said plaintiff to cut down, take and carry away, all the wood for firing from off the said fifteen acres of land. And this he is ready, &c. Wherefore, &c.

3rd. *Actio non*—Because defendant did from time to time and at all times, after making said bond, well and truly observe, perform, fulfil and keep all and singular the articles, clauses, conditions and agreements in the said condition specified, in all things therein contained, on his part and behalf to be performed. And this he is ready to verify. Wherefore, &c.

4th. *Actio non*—Because, although defendant hath always since making the said bond permitted and allowed, without any let, hinderance or molestation whatever, the said plaintiff to cut down, take and carry away all the wood for firing from said fifteen acres of land, and did afterwards

request said plaintiff to cut down, take and carry away all the said wood; yet plaintiff, when so requested, declared to defendant that he would not cut down, take and carry away the same, and hath ever since the making of the said bond, and during the space of five years from the date thereof, wholly refused to cut down, take and carry away the same or any part thereof. And this he is ready to verify. Wherefore, &c.

Replication to 2nd, 3rd and 4th pleas jointly: *Precludi non*—Because shortly after said bond and within five years from date and before plaintiff had cut down, &c. all the said wood or any part thereof, defendant by a certain indenture of bargain and sale, made between defendant and one Robert Coleman, which said indenture was sealed with the seal of defendant, in consideration of 200*l.* paid by Coleman to defendant, bargained and sold the said lot No. 12 to said Coleman, his heirs and assigns for ever, which said indenture was afterwards duly enregistered; by virtue whereof and of the Statute of Uses Coleman became seised of the said land in fee; and plaintiff further saith, that although at the time of the said indenture of bargain and sale, and from thence until the end of the said term of five years, there were divers trees fit for firing standing and growing on said fifteen acres, yet the said Coleman did not nor would at any time after the making of the said indenture, within the said five years, permit or allow plaintiff to cut down, &c. said trees, but wholly refused so to do, contrary, &c. And this he is ready to verify. Wherefore, &c.

Demurrer to this replication, assigning for cause—That replication is double and multifarious, in that it professes to be an answer to several and distinct matters of defence, pleaded in several pleas, so that defendant can take no distinct issue without departing from one or other of his pleas. 2nd. That said replication is no answer to the fourth plea, does not reply to the same or deny, answer or traverse any fact alleged therein.

Joinder in demurrer.

The case was argued in Hilary term last by *Sullivan* for the plaintiff and the *Solicitor General* for the defendant.

ROBINSON, C. J.—I think we must admit the pleas to be good, notwithstanding defendant says only that he always permitted, &c. and says nothing of assigns, for an assignment is not stated in the declaration or pleas, and is not to be presumed.—Str. 228; 1 Salk. 139. Then the replication assumes to answer all the pleas, and is not, in my opinion, an answer to the 4th plea, and being bad in part, the replication is bad for the whole, and the judgment must be for the defendant on the demurrer. My brothers, I believe, are clear that plaintiff must fail on another ground—namely, that he has shewn no breach of the agreement; since a mere refusal to permit—that is, a verbal denial of his right or declining to give assent on the part of the assignees—is no sufficient breach. They consider that the agreement between plaintiff and defendant gave the right and rendered no assent afterwards necessary, though an actual obstruction by the assignee of the exercise of that right would have constituted a breach of the conditions, but no such hinderance (*i.e.* by any act) is stated.

SHERWOOD, J.—The condition of the bond which the defendant executed to the plaintiff amounts to a license in favour of the latter to cut and carry away the wood therein mentioned on lot No. 12, in the first concession of Hope, for the term of five years, and the conveyance in fee which the defendant afterwards made of the lot did not, in my opinion, affect the license in any respect whatever. The plaintiff alleges in his replication that Coleman, the purchaser of the lot, refused to give him permission to take away the wood, but as it was not necessary to ask his permission either to enter upon the premises or to take away the wood, I think such refusal cannot properly be termed “any let, hinderance or molestation.” Indeed, the replication of the plaintiff does not go the length of alleging any act whatever on the part of Coleman which implies an obstruction—it merely alleges that “he refused to permit or allow” the plaintiff to cut or carry away the wood. He could not, I think, “let, hinder or molest” him in taking away the wood without some opposition by word or deed. The fourth plea of the defendant remains wholly unanswered, and therefore he is entitled to judgment on the demurrer.

MACAULAY, J.—I am of opinion the bond is equivalent to a gift or grant of the trees, and constitutes a license to the plaintiff to enter and cut them; that the replication is no answer to the fourth plea, and that it shews no breach of the bond. It being alleged that the assignee of the defendant did not nor would permit or allow the plaintiff to cut, &c. the trees, shews no *let, hinderance* or *molestation*. The plaintiff might have gone and cut them, although even verbally forbid, and could justify under the bond, as a license under seal binding upon the defendant and his privy the assignee, not revocable by word of mouth, and not revoked by the assignee merely not permitting or allowing the plaintiff to cut the timber.—Noy. 18; 3 Keb. 440, 162, 202; 1 Lut. 570, 97; 5 Mod. 133; 12 Mod. 86; Cro. Eliz. 348; Dyer, 27-8; 1 B. & P. 455; 1 Leon. 139, 124; Yel. 65; Cro. Eliz. 140; Show. 290, 252; 1 Sand. 337-8; Stra. 191; 6 T. R. 458; 10 Mod. 142; Al. 19; Freem. 122; 8 Mod. 318; 3 Taunt. 24; Hard. 132, 35; 8 Co. 91; 9 Co. 51; 2 Vent. 138-9; Com. R. 228; 6 Mod. 150; Cro. Jac. 567, 425; 2 Saund. 181, b.; Yel. 30; 1 T. R. 671; 1 H. Bl. 34.

Per Cur.—Judgment for defendant on demurrer.

BURGESS v. FANNING.

An action cannot be maintained by one partner against another, on an offer to pay a certain sum, if he would be allowed to keep the books and collect the debts.

Assumpsit on the common count and an account stated. Plea—non-assumpsit. At the trial it appeared that the plaintiff and defendant were partners, and tried to come to terms for a dissolution. The defendant had all the books, accounts, &c. and kept them in his own possession. The plaintiff claimed from him 100*l.* or more, as his share of the debts due to the firm, and offered to give defendant 80*l.* for his share, and to take the books to himself, receiving whatever might be due. This the defendant declined, but in his turn offered plaintiff 80*l.* for his interest in the concern. To this the plaintiff did not accede, and they parted. This action was then brought, treating this offer of the defendant as evidence of a mutual settlement of accounts, and an

acknowledgment of a balance by defendant as due to plaintiff. At the trial, on this evidence the plaintiff was non-suited, and an application was made in this term to set aside this non-suit by *Small*. The *Solicitor General* shewed cause.

Per Cur.—There is clearly nothing in the evidence to support an action at law by one partner against the other.

Rule discharged.

MONROE V. KING, ONE, &C.

WHITE ET AL. V. KING, ONE, &C.

In an action against an attorney he should have four full days in term to plead, but he is too late to set aside an interlocutory judgment signed before the four days had expired, two months after such judgment and after notice of assessment served; and an objection that there is not any date to a notice to plead, nor any statement that the plaintiff appears by attorney will not be entertained.

On the last day but one of Hilary term last the defendant moved to set aside the filing of the bills and all subsequent proceedings as irregular and defective, with costs, returnable in chambers on the 23rd February, 1835, which was discharged. The bill against the defendant, as an attorney, was filed in Monroe's case on the 12th November, 1834, and served the same day. There was no appearance entered by defendant or by plaintiff's attorney for him. On the 8th December interlocutory judgment was signed, and notice of assessment served on the 5th February for the next assizes for the Home District. In the bill it was omitted to insert that the plaintiff "*by S. W., his attorney,*" complains. The notice endorsed was—"unless you plead in *four* days from the date *hereof* judgment," &c. The only date was—"dated this — November, 1834." A demand of plea was annexed, dated 12th November, 1834. In White's case the proceedings were exactly similar, excepting that the date on the notice was in this way—"day — day — 1834," omitting "November." The objections taken were—1st. That though signed by Simon Washburn, plaintiff's attorney, the bill did not state that plaintiff declared by attorney, but is as if he declared in person.

2nd. Defect in the date of notice.

3rd. Interlocutory judgment signed before Hilary term, though the bill was not served so as to give judgment four full days to plead in Michaelmas term.

4th. Interlocutory judgment signed without appearance being entered by defendant or by plaintiff for him under the statute.

Washburn shewed cause to a rule again moved by defendant against the proceedings.

ROBINSON, C. J.—In the first place, I must state that when the court are moved in term to set aside proceedings for irregularity on technical objections, and a rule is taken out by the party moving, returnable before a judge in vacation, the order of the judge refusing to set them aside ought, as I apprehend, to conclude the matter, because he is to exercise the discretion which the court has of refusing to grant relief summarily where they think the refusal proper. An order setting them aside, if granted upon questionable grounds, might more reasonably be subject to reversal by the court. In this case, however, I think the court would have disposed of the case as the learned judge did. I agree in the conclusion he came to. I incline to think, as he did, that regularly the defendant could not be compelled to plead till Hilary term, and that the objection of signing judgment too soon, if objected to within a reasonable time, might have prevailed. The other objections, viz., that the plaintiff's attorney's name was not used at the commencement of the bill, the defect in the date of the notice, and the omission to enter common appearance by the plaintiff for defendant, were properly overruled I think on their merits, independently of the delay in moving; but upon the ground of delay, the defendant was too late in any of his objections. He would clearly be held to be so in England, if he had merely deferred until after the first four days of Hilary; but when it is considered that he, an attorney of this court, acquainted with the practice and resident in town, allowed the judgment, which he complains of as irregular, to remain against him from the 8th December for nearly two months of vacation, and in Hilary term he not only takes no step within the first four days, but although the plaintiff served

him with notice of assessment on the 5th of February, the fourth day of term, he lay by for eight or nine days, and only moved on the ground of their irregularities the last day but one of the term, when it was too late to dispose of the matter so as to admit of the plaintiff filing a new bill, under which he could go to trial at the next assizes; and when, besides, it is considered that when the parties were before the judge upon the rule the plaintiff offered the defendant to waive his judgment and allow him to plead, when he had yet many weeks to prepare for his defence, it would have been strange certainly if these rules had been disposed of otherwise than they were.

SHERWOOD and MACAULAY, J. J., of the same opinion.

Per Cur.—Rule discharged.

WADDEL V. McCABE.

The words "value received" in a stock note import *prima facie* a consideration, and a consideration which cannot legally be enforced may be sufficient to sustain a promise, and an agreement to pay money on a party's not bidding at a sheriff's sale is not void as being contrary to public policy, when the party making the agreement thereby insured the withdrawal of a claim from the land.

The pleadings, &c., in this case have been already reported (a). The cause went down for trial again at the last assizes for the Gore District. It appeared that one Stirling asserted a claim to a lot of land in the township of Binbrook, and gave a memorandum in writing to convey this land to plaintiff. There was no evidence that Stirling had any title, but McCabe, in consideration that Waddel would not bid against him at a sheriff's sale of this land for taxes or set up this claim, gave the following instrument: "Two years after date, I promise to pay unto Thomas Waddel or bearer the sum of 25*l.*, lawful money, for value received, to be paid in good merchantable wheat at the market price." McCabe became the purchaser at the sale, and Waddel did not bid against him. A general verdict was taken for the plaintiff, and at the trial the plaintiff was called upon by the defendant's counsel to say whether he intended to go upon any of his special counts or to abandon

(a) 3 U. C. Reports, (O. S.) 502.

them, and he was told that if he attempted to recover on a general account and failed, the defendant would object to his proceeding for the same cause of action upon any special count. The plaintiff did not however make any election.—*Vide* 5 Taunt. 142.

In Michaelmas term last *Sullivan* moved to set aside the judgment, and in Hilary term *O'Reilly* shewed cause.

ROBINSON, C. J.—There is clearly no objection to the plaintiff recovering upon the 8th count, unless a difficulty has been thrown in his way by anything that occurred at the trial. We have already decided in this cause before, the last trial, that upon the instrument given in evidence the plaintiff may recover upon the 8th count, stating a debt due upon an account, stated as the consideration for the defendant entering into this engagement.

I do not see how the plaintiff can be precluded from applying the evidence which he has given to the 8th count. That count states a special agreement to pay in wheat, the consideration of which is, that defendant on accounting was indebted in that sum. It is true the words “value received” are a sufficient admission of a debt *prima facie* to supply proof under such a count, but I cannot see how plaintiff can be prevented from going back into the foundation of debt, in order to strengthen the implication arising from the admission in the instrument. He shews that in fact the defendant had a sufficient reason for acknowledging a debt; that he had received a substantial benefit, though in a circuitous manner. He had, in consequence of a previous dealing with plaintiff, acquired a title to a lot of land, for which he agreed to give this 25*l*. No objection can lie under the Statute of Frauds. The defendant had got the consideration he bargained for. It has turned out beneficial to him, and that shews the admission of value received was well founded. The case of *Knowles et al. v. Mabel et al.* (15 Ea. 249) is strongly in point. The case of *Lee v. Muggudge* (5 Taunt. 42) is also applicable, to shew that a consideration, not capable of being legally enforced, may yet be sufficient to support a promise, and may be sustained as a sufficient consideration on the record.

I think the alleged agreement not to bid at the sheriff's sale is not a void consideration, as being contrary to public policy, when it is explained as the truth was here. It was the mere withdrawing a claim which the plaintiff had to the consideration of the public, and which he agreed to transfer to plaintiff, such as it was. He would have acted dishonestly if he had attempted to bid on the lot as the owner, and nothing more was meant than that he should not do so. If an exception can be sustained upon any of these counts, I would leave the defendant to his writ of error and not arrest the judgment.

SHERWOOD and MACAULAY, J. J., concurred.

Per Cur.—Rule discharged.

BANK OF MONTREAL V. J. G. BETHUNE.

The Bubble Acts 6 Geo. I. ch. 18, and 14 Geo. II. ch. 37, are not in force in this province, and banks chartered by acts of the provincial parliament could not come within the provisions of those acts.

The defendant was sued as endorser of a promissory note for 152*l.* 6*s.* 6*d.* made by Donald Bethune to defendant or order, and by defendant endorsed to plaintiffs, who bring this action under the corporate name of "The President, Directors and Company of the Bank of Montreal."

The defendant pleaded the general issue and a special plea, in which he urges, as a defence, that certain persons, whose names are unknown to him, illegally associated themselves and transacted business as a bank in this province, issuing illegal notes, &c. under the name of "the President, Directors and Company of the Bank of Montreal;" that this note was endorsed by defendant for the accommodation of the maker, and was delivered to the said persons, &c. so illegally carrying on business as bankers, in the course of such their illegal business, contrary to the statute of 14 Geo. II. ch. 37.

The plaintiffs demurred generally to this plea. Joinder in demurrer.

This case was argued in Hilary term by *Bidwell* for plaintiffs and *Sherwood, H.*, for defendant.

ROBINSON, C. J.—The defence is in fact the same as was pleaded to the action of the Bank of Upper Canada against

Donald Bethune, in which case the court have given judgment this term (*a*), and it is of course decided by that judgment. It is unnecessary for us, having so fully explained the grounds and reasons of our opinion in the case referred to, to discuss them again here. We consider that the defence intended to be pleaded could not be sustained otherwise than by shewing in the plea that the Montreal Bank was an illegal undertaking or project, under the provisions of the 6 Geo. I. ch. 18. That it is not made out to be illegal under the terms of the 14 Geo. II. ch. 37, alone, and without reference to the 6 Geo. I., and being of opinion that the 6 Geo. I. ch. 18, is no longer in force in this province, since its repeal by the Imperial Parliament by the act 6 Geo. IV. ch. 91, our judgment is for the plaintiff on the demurrer.

My own opinion is, that the plea could not have been sustained if the 6 Geo. I. ch. 18, were still in force. I think it bad on several grounds. It does not make out a case, which, on the 14 Geo. II. alone, would shew the company to be illegal; and yet it does not refer to the 6 Geo. I. ch. 18, to which it would be necessary to resort (supposing that statute to be in force) before the defence intended could be sufficiently pleaded. It does not, in my opinion, state a case sufficient to shew the company to be an illegal association under either or both of these statutes; and the illegal conduct intended to be set up as a defence is not imputed to the plaintiffs, but only to certain persons unknown, who it is said associated themselves together, and used the name under which the plaintiffs in this action are suing. In my opinion, we could not declare this statement in this plea sufficient to defeat the plaintiffs' recovery upon the ground that they are shewn to have been guilty of a public nuisance in the course of the transaction out of which this claim has sprung, unless the allegations were so direct and circumstantial that they would be sufficient in an indictment for a nuisance under the statute relied upon; and to convict a man of a crime, a case must be stated which requires no intendment to help it out. It would not do to conclude the

plaintiffs in this case to have committed an offence, subjecting them to the penalties of a *præmunire*, upon the mere surmise or presumption that certain persons who set up an illegal scheme under the name of the President, Directors and Company of the Bank of Montreal, were the same persons who are suing in this action under that name, it being nowhere alleged throughout the whole pleading that they are the same persons.

SHERWOOD and MACAULAY, J. J., of the same opinion as to the demurrer.

Per Cur.—Judgment for plaintiffs on demurrer.

In this term the following gentlemen were called to the bar and sworn in:—JOHN POWELL and JOHN WILSON, Esquires.

JNO. B. ROBINSON, *C. J.*

L. P. SHERWOOD, *J.*

J. B. MACAULAY, *J.*

KING'S BENCH.

TRINITY TERM, 5 & 6 WILLIAM IV.

DOE EX DEM. McINTOSH V. McDONELL.

Lands are not bound under the 5 Geo. II. ch. 7, until the delivery of the *fi. fa.* against them to the sheriff. The judgment of a District Court could not bind them for want of a docket.

Ejectment for lands in the Eastern District.—The plaintiff claimed title under a conveyance from the defendant's father, dated 29th January, 1828, registered 1st February, 1828. The defendant claimed under a sheriff's deed upon a sale of the same land under two District Court judgments against defendant's father, entered 21st July, 1826, upon which execution issued against goods in due time, and on 15th November, 1828, a *fi. fa.* was issued against lands, returnable 1st of January term, 1830, and the question raised

was—whether the purchase from defendant's father, under the deed of 29th January, 1828, did not pass the estate, notwithstanding the judgment and sale, to the defendant? A verdict was taken for the lessor of the plaintiff, subject to this question, which was argued in Hilary term for the lessor of the plaintiff, and in Easter term for the defendant.

ROBINSON, C. J.—If lands and tenements are bound by the judgment or by the delivery to the sheriff of the *fi. fa.* against *the goods*, then the sale by the sheriff would be good, unless, as is contended, the delay of two years in proceeding against the lands should operate in favour of the subsequent purchaser; but if lands are not bound before the delivery of the *fi. fa.* against *the lands*, then of course the lessor of the plaintiff is entitled to recover. In the case of Doe ex dem. Clark and Street v. Updegrove, in which I was concerned at the bar, I apprehend it was distinctly adjudged by the court that lands and tenements are not bound in this province for the purpose of sale under a *fieri facias* upon the 5 Geo. II. ch. 27, until the writ is delivered to the sheriff, as in the case of goods and chattels. That decision having been made and, so far as I know, acquiesced in to this time, it is incumbent on us I think to abide by it until it shall be overruled by higher authority, otherwise persons who may have acquired titles in accordance with the law, as settled by the judgment of this court, would be subject to great injury from inconsistent decisions. Independently of this authority, by which I think we must be bound, it is to be considered that there is no evidence here of the judgment under which the lands were sold having been docketed, and we know that in fact no such docket is kept as the statute 4 & 5 W. & M. ch. 20, directs, that statute being conceived to be applicable only to the Court of King's Bench, as being a supreme court, similar in its jurisdiction and authority to the King's Courts at Westminster. Then the question arises, if it is not made the duty of that court to docket its judgments agreeably to the 4 & 5 Wm. & Mary, can it be reasonably expected that a purchaser under execution is under any circumstances to give proof that such a docket has been made? My opinion

is, that in no event since the statute can a judgment not docketed bind lands to the prejudice of a *bona fide* purchaser, since it would be absurd to allow a judgment of an inferior court an authority over lands, beyond what can be attributed to the judgments of the superior court. I am further inclined to the opinion, that since at common law no writ of *fieri facias* lay against lands, and the property in them could not be altered by or under a judgment. So taking, as we do, that process under the provisions of the statute 5 Geo. II. ch. 5. we have no authority to give to the writ a greater effect than that statute warrants, and so far from declaring that upon a *fieri facias* any lands may be seized and sold which the debtor had at the time of the judgment entered, the statute expressly places the remedy by execution against lands upon the same footing and no other as against goods, and goods, it is plain, are bound only from the delivery of the execution to the sheriff. I do not however pursue the question, because I consider it no longer an open question. I am of opinion that the lessor of the plaintiff should retain his verdict. Whether in this province the 5 Geo. II. ch. 7, should not be held virtually to take away the remedy by *elegit*, may be made a question; it is not necessary here to determine that; but at present I doubt whether an *elegit* can be taken out here.

SHERWOOD, J.—The following opinion was given by me in the cause of Doe ex dem. Clark et al. v. Updegrove et al., and was afterwards delivered to the reporter, Mr. Taylor, to be entered among the reports of cases decided in this court. By some accident it was never reported:—

In my view of the case, I think it necessary to examine the two following points only:—1st. Are lands bound by the entry of the judgment? 2nd. Is it necessary to procure and file the return of the sheriff on the writ of *fi. fa.* against the goods, when nothing is seized or levied under it to entitle the plaintiff to a *fi. fa.* against the lands? In my opinion, the entry of the judgment did not bind the lands at common law. The plaintiff might have a writ of *levari facias* against the defendant, and levy the rents and growing profits of the land, but he could not take possession of them

or sell them. The defendant at any time, before or after final judgment, might sell his lands, and the plaintiff in such case would have been entirely ousted of his remedy. When the defendant was the King's debtor a different rule at the common law prevailed. The King was at liberty to take possession of his debtor's lands, and to keep possession of them till his debt was satisfied from the rents and growing profits. The real estate, however, could not be sold at common law, even for a debt due the crown. The law remained unaltered till 13 Eliz., ch. 4, when it was amended, and by the 25 Geo. III. ch. 35, it was further altered, and lands at this day are most usually sold for the King by virtue of the latter statute, because the former does not extend to all cases, and it has been found inconvenient to obtain a title under it, which must be made by letters patent. By these statutes all real estate can be sold for the King's use, independently of the provisions of 5 Geo. II. As the common law did not allow the judgment to prevent a sale of the defendant's real estate by himself, nor allow it to be sold under an execution for the benefit of the plaintiff, there was no permanent security for the satisfaction of debts from lands. Experience, however, soon proved that commerce could not be carried on to any great extent or advantage without such security, and the parliament in England thought it proper at an early period to interfere. The statute Westminster 2nd (13 Edw. I. ch. 18) was passed to remedy this evil. *It expressly enacts that the judgment shall bind the real estate*, and gives the plaintiff the writ of execution called an *elegit*, by which one moiety of the defendant's land may be taken by the sheriff and appraised as to its yearly value, after which the plaintiff may keep it till his debt be satisfied, according to the estimate in the inquisition returned by the sheriff. The tenant, by *elegit*, has thenceforward an estate determinable on the contingency of the satisfaction of the debt, and his term is necessarily protracted or shortened in a ratio with the yearly value of the land and the amount of his debt. In the mean time, till a termination happens of the tenant's estate, the debtor or real owner of the premises can sell them, subject

to payment of the debt. It therefore clearly appears to me that the binding of the real estate by judgment under statute Westminster 2nd, creates only an incumbrance for a known and certain period after the return of the elegit. I will now briefly examine the laws of this province as respect the liability of real estates to the satisfaction of debts. I think the common law of England and the statute Westminster 2nd are in force here ; besides which, we have the 5 Geo. II. ch. 7, which they have not in England. The fourth section is in the following words:—"That from and after the 29th September, 1732, the houses, lands, negroes and other hereditaments and real estates, situate or being within any of the said plantations, belonging to any person indebted, shall be liable to and chargeable with all just debts, duties and demands of what nature or kind soever, owing by any such person to his Majesty or any of his subjects, and shall and may be assets as real estates are by the laws of England, liable to the satisfaction of debts due by bond or other specialty, and shall be subject to *the like remedies, proceedings and process*, in any court of law or equity in any of the said plantations respectively for seizing, selling, extending or disposing of any such houses, lands, negroes or other hereditaments and real estates, towards the satisfaction of such duties and demands, *and in like manner* as personal estates in any of the said plantations respectively are seized, extended, sold or disposed of for the satisfaction of debt." It is, I believe, a well known rule of law, that all acts of parliament made in *pari materia* must be taken together and construed as one act, and I take it to be equally clear, that where they are made with peculiar and distinct views, and intended to produce consequences to the parties interested different in their extent and nature, and to have a separate operation different in separate countries, that this rule no longer holds good. The statute Westminster 2nd was made to enable the creditor to get possession of one-half of the real estate of his debtor, and to hold the possession till the annual profit of the land should satisfy the debt. It was altogether contrary to the feudal principles recognized in the reign of Edward I. to allow of the actual sale

of any part of the real estate under an execution for debt. This statute maintains in full force the legal distinction between real and personal property, but still makes an innovation on the common law, by allowing to the creditor the use of one moiety of the debtor's land to satisfy the debt, and by allowing the judgment to create a lien on the real estate from the moment it is entered. It appears to me that when the British parliament framed the statute 5 Geo. II. it designed to give an entirely new remedy to the creditor for the recovery of debts due in the colonies, and at the same time leaving it at his election to proceed under that act or under the local laws of the colonies. The preamble and enacting words of the act appear to me to point out a distinct remedy in nowise grafted on the English law or on any colonial institution. When the statute is considered in this view, a greater part of the embarrassments and difficulties vanish which present themselves at every step in the endeavour to amalgamate the principles established by this act relative to real estates, with those of the common or statute law of England. It seems to me that when the time and the circumstances under which this act were passed are fairly taken into consideration, it is not possible to arrive at the conclusion that the British legislature ever intended by this statute to modify and extend the provision of Westminster 2nd, or ever designed that the two laws should be taken in *pari materia*, or at all connected with each other in their operation and effect. I also think that no consequence of this kind would be produced by the adoption of the English laws in this country, because the provincial act made for that purpose does not at all alter the original enactments of the legislature in England, and indeed does not profess to do so, but merely to introduce the law of England into Upper Canada. The statute of Edward I. was made for the meridian of Westminster, but the statute of Geo. II. was made to have a transmarine operation where the laws of the mother country, as a general code, in any one of the colonies, were not in force. The effect of the first statute is to cause the one-half of the real estate to be bound for the satisfaction of debt, and by this

means to provide a permanent security for their ultimate and gradual payment. The second statute authorises the actual sale and conveyance of real estates for the payment of debts, and thereby affords a more easy and prompt remedy for creditors. Each of these statutes possesses its peculiar advantage and utility, and I am well convinced the state of the province is much more improved by possessing both acts than it would have been by having only one. The creditor is abundantly secured against every species of fraudulent conveyance by the 13 & 27 Elizabeth, but should the debtor have sufficient subtlety and adroitness to escape beyond those modern barriers of the law, he must eventually find his progress completely arrested by this old-fashioned rampart of Edward I.

I will now endeavour to give some explanation of that part of the statute 5 Geo. II. which I have already cited. The fourth section of the act makes lands in the colonies liable to the payment of all just debts, and further makes them subject to the remedies, proceedings and process for seizing and selling them, and *in like manner* as goods and chattels. The 13 Edw. I. leaves the common law principles relative to the fee simple in real estates wholly untouched, but the 5 Geo. II. at one stroke prostrates all those landmarks which for ages have distinctly shewn the line of separation between real and personal property, and unites them in the same class when debts are to be satisfied. Real estates, by the express words of the statute, are to be subject to the like remedy and proceeding, and in like manner for seizing and selling them to which goods are subject. I now come to the principal question—are lands bound by the judgment? That goods are not bound by the judgment will be readily conceded, and I think it equally clear that lands are not so bound, unless the act contains plain words directing real estates to be bound by the judgment, or unless an inference to the same effect may be fairly drawn from the general provisions of the act. A perusal of the fourth section is quite sufficient to convince any one that it contains no express enactment that land shall be bound by the judgment, otherwise no doubt would have

arisen, and I now come to the ultimate consideration—whether the binding by the judgment may be inferred. The beginning of this section enacts that real estates shall be liable to the payment of debts—the end of the section prescribes in what manner they are to be liable. It is a general rule in the construction of statutes that one part shall be construed by another, and the whole shall be so understood that if possible no sentence or even word shall be superfluous or insignificant.—1 Inst. 381. Another general rule is to ascertain how the common law stood in regard to the same subject before the making of the statute, and then consider from the words of the statute to what extent the legislature intended to alter the common law.—2 Inst. 148. It has been already stated that the judgment at common law did not bind the lands, and that the 5 Geo. II. cannot be construed in *pari materia* with 13 Edw. I. In order the more easily to come to a conclusion on the whole subject, I will now advance one proposition which I take to be self-evident, but which may seem to elucidate some of the subsequent remarks. If the legislature by the fourth section 5 Geo. II. intended the judgment should bind real estate in the colonies in any one case, they intended the judgment should bind real estate in all cases. I will now examine if this can be done if the judgment binds lands without departing from the plain words of the act. Goods at the time of passing this act were by the law of England bound only by the delivery of the writ of *fi. fa.* to the sheriff, and they still continue to be so bound. The remedy for seizing and selling lands, by the words of the act, is to be like the remedy for seizing and selling goods. Now what is the remedy which the law gives the plaintiff for seizing and selling goods? The answer is obvious. The plaintiff's remedy against the goods consists in the binding of them by the delivery of the writ of execution to the sheriff and by the subsequent sale of the goods. Suppose the plaintiff enters judgment, but before he takes out execution the defendant sells both his land and his goods for a full and valuable consideration to a *bona fide* purchaser, without notice of the judgment. In this case the plaintiff

clearly cannot seize and sell the goods, but if the judgment binds real property he may seize and sell the lands. The vendee of the defendant would hold the goods and lose the lands, and the plaintiff himself would sell the lands and lose the goods. Here then is one instance which would contravene the very words of the act, for it is quite clear the lands and goods would not be subject to the like remedy. Again : suppose A. enters judgment against B., and then C. enters judgment against B., sues out execution against the goods, and delivers it to the sheriff before the execution of A. is delivered. Every professional man knows that the execution in favor of C. must first be satisfied. C. then sues out and delivers an execution to the sheriff against the lands, but before a sale takes place A. sues out execution against the lands and delivers it to the sheriff. According to the words of the act C. is entitled to the like remedy and in like manner against the lands as against the goods, but if the judgment binds the lands, A. takes the like remedy against the lands and in like manner as C. had against the goods, and C. goes without any remedy at all against the lands. Here then is a second instance at variance with the words of the act, and as clearly shews as the first that lands are not subject to the like remedy and in like manner as goods and chattels, if real estates are bound by the judgment. Many more instances might be selected, but I have mentioned these two as being of the most ordinary occurrence, and at the same time similar in principle to all the others, although different in circumstances. This statute cannot effect the prerogative of the King, who by the common law always had a right to an extent against the body, lands, goods and debts of his debtor ; and therefore that part of the act relative to the satisfaction of debts due the crown has nothing to do with the present enquiry, and need not be examined. It appears to me that the statute West. 2nd is in force in this province, because it forms a part of the law of England relative to property and civil rights ; and I also think the 5 Geo. II. is in force here *ipso facto*, because Upper Canada is one of the British American Colonies, in which this statute by its own terms is to operate. There is

another reason for alleging that the 5 Geo. II. was not introduced into this province as part of the law of England. The 14 Geo. III. ch. 83, sec. 18, expressly declares that all acts of the British parliament before that time, concerning or respecting the colonies and plantations in America, should be in force in the late province of Quebec, which then comprised Upper Canada; and the 31 Geo. III. ch. 31, sec. 33, declares that all laws and statutes which were in force in the province of Quebec should be in force in this province till altered by an act of the legislature. The 5 Geo. II. was therefore the law of the province for about eighteen years before the statute West. 2nd became a part of the laws of this colony. The rules of human action which govern the members of civil society in England are called the law of England; and, in my opinion, the 5 Geo. II. is no more a part of that law than any act of the British parliament made for the government of our possessions in Asia or Africa. The statutes of West. 2nd and 5 Geo. II. are certainly directed to the same object—that is, to compel the payment of debts; but the remedy under each is peculiar to itself, and they are like two different routes leading to the same point, which constantly converge but never actually meet till the ultimate termination of both. The 5 Geo. II. was never intended to have any operation in England or where the statute West. 2nd was designed to be in force; and as they contain distinct remedies, they must necessarily receive distinct constructions. Upon the whole, I think the words of the 5 Geo. II., and all legal inferences fairly drawn from its enactments, clearly prove that real estates are bound by the delivery of the writ of *fi. fa.* against them to the sheriff, precisely like goods and chattels, and that they are not bound by the judgment under that act for the purpose of sale, as they are by the laws of England for the purposes of extent under the statute of West. 2nd.

I will now endeavour to examine the second point—Is it necessary to procure and file the return of the sheriff on the writ of *fi. fa.* against the goods, when nothing is seized or levied under it, to entitle the plaintiff to a *fi. fa.* against the lands? This question must in a great measure be deter-

mined by the construction of the provincial statute 43 Geo. III. ch. 1, entitled, "An act to allow time for the sale of lands by the sheriff." The preamble of this act declares, "That whereas it is expedient in the present circumstances of this province that some time should elapse after issuing process of execution against lands and tenements before the sheriff proceeds to expose the same to sale." And then the legislature enacts, that from and after the end of the present session of parliament goods and chattels, lands and tenements, shall not be included in the same writ of execution, nor shall any such process issue against lands and tenements until the *return of the process* against goods and chattels. A professional stranger reading this act might be somewhat surprised to find any doubt entertained of the meaning and intention of the legislature; but erroneous practice, in my opinion, has in some degree rendered these terms obscure to practitioners, which in truth are quite clear. All the difficulty arises on the definition of the word "return" used in the act. The word return, in all legal treatises, has two determinate meanings: one signifies the time or day on which a writ is made returnable, the other signifies the act done by the sheriff in obedience to the writ, an account of which he certifies on the back of the writ. The adjuncts accompanying the word "return" in a statute generally shew to which of these two subjects the word relates. Sir W. Blackstone, in giving the history of an action at law, makes the following remarks:—"The day on which the defendant is ordered to appear in court, and on which the sheriff is to bring in the writ and report how far he has obeyed it, is called the *return of the writ*."—3 Com. 275. It therefore appears that the return of the writ, and the return of the sheriff endorsed on the writ, are altogether different subjects. To which then does the word return used in the act relate? In the present instance the word "return" is immediately followed in the statute by the words "of the process;" and I believe the expression which is so frequently found in the books, "of the return of the writ or process," uniformly means the day on which the writ or process is made returnable, for which reason I

conclude it was used in the same sense in this act. I now readily come to this conclusion, because if the word "return" used here should be determined to signify the return or certificate of the sheriff on the writ, it would in truth be so ambiguous and indeterminate as in all cases to become useless, as the sheriff might return no goods, or he might return that the writ came to him too late to be executed, or that he had seized goods which remained in his hands for want of buyers. Indeed, the sheriff can make no return which can be of any utility whatever to the parties, for if he should certify that he had fully levied the amount of debt or damages from the goods, then no writ of execution could issue against the lands. If no part of the amount be made, then no return of the sheriff is necessary, because the first writ, in the case of goods and chattels, is never recited in the second, nor is any notice taken of it in any other proceeding when nothing has been levied on it. If a part of the money be made, then indeed the first writ must be recited in the second, and then the sheriff must make a formal return on the first writ before a second can issue for the remainder. If the 5 Geo. II. had enacted that no execution against lands should issue till a total failure of goods, then the case would be different; but such an idea is so clearly against the provisions of that act as to preclude a possibility of a doubt, and I shall therefore not stop to make any remarks on that head. In my opinion, our provincial parliament made the 43 Geo. III. for the express purpose of allowing a fixed and determinate time to the defendant to settle his debt before any execution should issue against his lands, which in a new country is the principal support of the owner and his family. It cannot be supposed, however, that the legislature intended to give a fluctuating and fortuitous indulgence to the defendant, or to do so much injustice to the plaintiff as to place him in a perfect state of dependance on the negligent and irregular habits of persons holding the office of sheriff in this province, for if it were so, one plaintiff, by the utmost exertion, might not be able to obtain an execution against the lands in six months, while another might procure it in three months, according

to what sheriff the writ of *fi. fa.* might happen to be directed.

I am, therefore, of the opinion that it is not necessary in any case to procure and file a return of the sheriff on a writ of *fi. fa.* against the goods, when nothing is either seized or levied under it. To entitle the plaintiff to a *fi. fa.* against the lands after the day on which the *fi. fa.* against the goods is made returnable, I think such ineffectual writ need not be recited in the writ of *fi. fa.* against the lands and tenements, and that it need not be noticed in any other proceeding in the action.

MACAULAY, J.—It may be unnecessary for the decision of this case to enter upon the general questions mooted in the argument—namely, whether lands are bound in any of the courts of the province from the entry of the judgment, or only from the issue of the execution for the purpose of sale, under 5 Geo. II. ch. 7—and if from the judgment, whether they are liable to be sold under process of execution issuing out of the district court—and if so, whether in those courts bound from the judgment, or execution only.

It having been decided that judgments did not bind lands for the purpose of sale, under 5 Geo. II., such perhaps should be taken to be the law of the land, until revised or altered by some higher authority. Since, however, I incline to the opinion that judgments do in this court bind lands under 5 Geo. II., I will state my views upon the subject, before considering the minor points that may exclude the question—either generally, by reason of the former decision, or specially, for reasons peculiar to this case. In the case of *Gardner v. Gardner*, (a) I observed that since the law of England prevails here, this, in common with all other cases, should be examined and disposed of upon the principles of that system, part of which relates of course to the doctrine and tenure of real estate: and since, had not the 5 Geo. II. c. 7 existed, we would necessarily recur to the law of England to ascertain the effect of and remedies under judgments recovered in his Majesty's courts of record, whether of superior or inferior jurisdiction; and since 5

(a) Trinity Term, 2 & 3 Will. IV.

Geo. II. c. 7, must be regarded as engrafted upon that system, and as superadding to, but not taking away from, the effect and remedies thereby imparted, I shall in the first instance advert to the rules of law operating in England upon these heads. As 5 Geo. II. ch. 7 relates to debts due to his Majesty and any of his subjects, the remedies open to the crown, as well as individuals, should be explored.

It is said in Gilbert's Exchequer, 88, and in Gilbert on Executions, 8, that all debts due to the King, bind from the time the same are contracted—for that debts of record always bound the land, and that debts not of record bound as a statute staple by 33 H. VIII. c. 39: that all lands being held mediately or immediately of the King, when any debt was *recorded* of any person, it laid the estate as liable to such debt as if it had been a reservation in the first patent; and therefore, as the King could seize for the non-payment of a reserved rent, so he could seize the land for any debt with which the land was charged—but the lord giving out any tenure for knight or other service, could not seize for the non-performance of such service, as they did among foreign feudists, because the King had an interest in such services; for since the baron was to come attended with so many knights, the King had an interest in the vassal who attended the lord that was to attend him (a); wherefore, lords were not permitted to seize the feuds of their tenants, but to distrain them for the services reserved. In the same manner, if the debt was recovered by the lord in the Court Baron, he could only order the bailiff to levy that debt by distress, for he had the same remedy for the debt recovered in his court as he had for the rent, and therefore the King, who had the eminent dominion, could seize for the non-performance of the tenant, as the lord of the feud could by the feudal law. So, whenever he had *charged* a debt on his tenant, he had the same remedy as on an original reservation, and therefore the King, having a right to seize for the reservation, had likewise a right to seize for the debt; but the lord, having no more than a right to levy on the goods, and not a right to seize the land itself,

(a) Vide 2 Hallam's History of the Middle Ages, 430.

the debt to the lord did not bind the land as the debt to the King did, which subjected the land to a seizure from the time it was a record. The feudal principles here adverted to will be found explained in Gilbert's Hist. Com. Pl., Introduction; Gilbert's Exchequer Bar. Ab. Court Baron; and the nature of feudal tenures as introduced and established by the Conqueror, and of feudal services due to the King and the barons respectively, should be remembered as essential to a thorough understanding of what has been above remarked.

If it had not been determined that a record would have bound the land as firmly as if it had been in the feudal patent, then it would have happened that the subject, by an alienation of his land, might have defeated the King's execution, which must frequently happen, since the King was to give notice before he could seize the land itself.—Gil. Exon. 8. Though the King had remedy at common law against the lands of his debtors, yet he could not sell them.—3 Sal. 286; 2 Inst. 18, 19; Dyer, 224-5. He might proceed by *levari facias* or extent, to obtain the profits, &c., and even as to them he was by Magna Charta, 9 H. III. c. 8, restrained from resorting to the lands until the goods were exhausted. We shall find that an extension of the remedy by sale was not supposed to be separated from the lien, but to be superadded to and affirmative of the previous remedies attended by such lien. Goods were at common law bound by the teste of the writ as well on a *levari facias* as on a *fieri facias*, yet the latter will be found, if not to have originated in, to have assumed a distinctive character under the statute 13 Edw. I. st. 1, ch. 18, hereafter noticed. It appears from the books, that debt of record due to the crown always bound the lands from the date of the record.—Gil. Ex. 88. Also upon bonds taken in the form prescribed by 33 H. VIII. ch. 39, sec. 50, being upon the footing of statutes staple from the time when such bonds were entered into.—West on Extents, 123. Simple contract debts did not bind the lands at common law before they were recorded, (Whitw. 34; Tedd, Pr. 1096); nor do they now, except as against certain public officers described in

13 Eliz. ch. 4, sec. 2, and known public receivers and accountants, whose lands, it is said, were always bound from the time their debts accrued.—West on Ext. 129; 8 Rep. 171; 7 Rep. 21; Bac. Ab. Exon. K. The debts of those embraced in 13 Eliz. ch. 4, being therein placed upon the footing of statutes staple, the nature of these statutes must be considered. With respect to all simple contract debts, they bind lands as soon as recorded, though not previously. They are ascertained of record, under a commission and inquisition.

Upon the first principles of the common law, a judgment of record would bind goods in all cases where the goods were liable, as well as lands where lands were liable.—3 Ea. 444; 7 Co. 38; 1 Co. 106. The effect of such judgment being to charge the effects with the debt and the execution related to, or might be so framed as to relate to the entry of judgment at whatever time such process issued, provided it did issue within the year. This principle afterwards received modification, upon the grounds of justice and expediency, by being restricted in construction to the teste of the execution instead of the entry of the debt on record. The material point to the present argument is—upon what principle and for what reason would the execution relate to the judgment, if not restrained in construction of law to the teste? For that principle, whatever it be, establishes that the judgment would operate as a lien in the absence of any restriction, as a necessary consequence of the relation of the execution to its entry, and when ascertained, it will be found that, though abridged as respects the goods, it remains untouched as regards the lands. The mode of levying the debt on the debtor's lands was by a *levari facias*, (after the seizure of the lands under the extent), said to be founded upon 33 H. VIII. ch. 39, by virtue of which *levari* the sheriff levied the rents and growing profits, and until 13 Eliz. ch. 4, the remedy experienced no extension; indeed until 25 Geo. III. ch. 35 facilitated the proceedings, it was not usual to sell the land itself in satisfaction.—Gil. Exon. 7; West, 3, 5, 221. The 13 Eliz. ch. 4, entitled, “An act to make the lands, tenements, goods

and chattels of tellers, receivers and others liable to the payment of their debts," extended the remedy as to certain public officers therein named. The first section made the land of any of those officers indebted liable for such debts, as upon writings obligatory, having the effect of a statute staple. The second section, reciting the inadequacy of the recourse against the yearly value only, provided for the sale under certain circumstances of the lands of the officers therein mentioned, which sale was required to be by letters patent under the great seal. The 27 Eliz. ch. 3, reciting that doubts existed whether lands of the crown debtors could be sold under the former act after the death of the debtor, enacted that they might be sold for debts known within the lifetime or within eight years after the death of the party; the proceeding to be by *sci. fa.* against the heir, who might upon a garnishment shew that the executors had assets sufficient of the personalty, in default whereof the lands were to be sold in ten months. *Bona fide* sales after the death of the ancestor were protected. If the heir was a minor, proceedings were suspended till he attained full age, and then a sale of the lands was allowed within eight years from the latter period, as if he had been twenty-one at the death of the ancestor. Owing to the inconvenience of obtaining letters patent to sell, the practice by *levari* continued till the 25 Geo. III. ch. 35, authorised such sale by the Court of Exchequer, upon a summary application of the attorney-general after extent. A deed enrolled in that court was to be made by his Majesty's remembrancer, and to be valid against all claims except by title paramount to the extent. The court was also enabled to make order for the production of title deeds. No notice is taken of heirs during minority, and it nowhere appears that the enlarged privilege of sale had any influence upon the right of lien; but on the contrary, the only inference is that such lien was supposed to and did subsist, as well with respect to the remedy by sale under the statute as of the remedy by *levari facias* at common law.

It has been held that in common law the lands were not bound by a judgment in favour of a subject, because lands

were not liable to the satisfaction thereof. The King's remedy was at one time abridged by Magna Charta, and afterwards extended by 33 H. VIII., 25 & 27 Eliz., and 25 G. III., all which acts were in force previous to our adoption of the law of England; and the authority and jurisdiction enjoyed by the Court of Exchequer there, are imparted to this court in matters which regard the King's revenue, by 34 Geo. III. ch. 2.

At common law there was no execution which gave possession of the lands of a debtor to the subject—not only because the debt was contracted upon the personal security of the subject, but also that the lord might not have a stranger put upon him; but those only were to enjoy the land who came in by feudal donation.—Gilb. Exon. 32. The only satisfaction was against the goods and chattels by *fi. fa.*, or against the rents and profits of the land by *levari facias*, of which more will be said hereafter.—Gilb. Exch. 115. The reason why lands were not originally liable, affords no argument against the effect of a judgment of record after they were made liable. The first legislative amelioration was 11 Ed. I. ch. 1 (A.D. 1283), Stat. de Mercatoribus, reciting that merchants were greatly impoverished, there being no speedy law provided for them to have recovery of their debts at the day assigned for payment, and authorizing merchants to bring their debtors before the Mayor of London, and others mentioned, to acknowledge the debt and day of payment, whose recognizance should be entered on a roll; a bill obligatory was also required to be sealed by the debtor and the King's seal—and in default of payment, the Mayor, &c. shall cause the moveables to be sold; if no buyers, the goods to be delivered to the creditor upon appraisement; if no moveables, the body shall be taken. No recourse is given against lands. Next came the 13 Ed. I. st. 1, ch. 18, “where a debt is recovered or acknowledged in the *King's Court*, or *damages awarded*, it shall be from henceforth in the *election* of him that sueth for such debt or damages to have a writ of *fi. fa.* unto the sheriff, to levy the debt off the *lands* and *goods*, or that the sheriff shall deliver to him all the chattels of the debtor

(saving only his oxen and beasts of the plough), and the one-half of his land, until the debt be levied upon a reasonable price or extent." Then followed 13 Ed. I. st. 1, ch. 45, giving stability and effect to records, and authorising a *fi. fa.* to revive judgments, &c. after the year. Next, 13 Ed. st. 3, ch. 1 (1285), of merchants, provides for acknowledging statutes staple, and authorises a *capias*, and after a quarter of a year, chattels may be seized and delivered to the creditor—during the succeeding quarter, the creditor may realize the debt out of the goods, and the debtor may sell his lands for the discharge of his debts, which shall be good and effectual; but if he do not agree within another quarter, all the lands and goods of the debtor shall be delivered unto the creditor, by a reasonable *extent*, to hold until the debt be levied, the body remaining in prison; if *non est inv.* be returned, the creditor shall have a writ to all sheriffs where the debtor shall have land, who shall deliver to the creditor all the goods and lands by a reasonable extent. After extent, the debtor may sell his land, so as the creditor have no damage of the appovements. Where lands be delivered, the creditor shall have seizin of all the lands that were in the hands of the debtor the *day of the recognizance made*, into whatsoever hands they may come. If the debtor die, the creditor shall have his lands descended to the heir, if he be of age, or when he shall be of full age. Then follows 27 Ed. III. st. 2, c. 9, Stat. Staple, authorising remedy against the body, goods *and lands*, of which execution is to be made in manner as it is contained in the statute Merchant: "So that he to whom the debt is due shall have estate of freehold in the lands and tenements which shall be delivered to him by virtue of the process," &c. The debtor to have no advantage of the quarter of a year, as in the former act. The time for which the lands are bound under this act is not expressed, and is to be determined by implication and general legal principles. It enacts that "a writ shall be sent to seize the lands and tenements, goods and chattels, and the writ shall be returned in the Chancery, with the certificate of the value of the said lands and tenements, and thereon due execution shall be

made from day to day, in manner as is contained in the stat. Merchant."—*Vide* 4 Cruise, 120; 2 Cruise, 53, 4, 5.

The 23 H. VIII. ch. 6, makes further provision, and prescribes a form. It extends the privilege of taking such recognizances to all people.—Gilb. Exon. 14, 30. Goods were not bound by the judgment, because the judgment was in force for a whole year, and it would be hard that none against whom judgment was pronounced should buy or sell for that year, and the goods being bound from the teste of the execution, its operation was by 29 Ch. II. ch. 2, sec. 3, altered to the time of actual delivery to the sheriff, which was in fact only restoring the old law, that supposed the writ to be delivered immediately. The stat. West. 2, ch. 18, did not alter the law in relation to goods, because it does not extend the remedy; but it gives remedy as to lands, and therefore the words of the statute are construed to extend the remedy as to the land to the time of the judgment.—2 Inst. 394. It gives election immediately as soon as the judgment is recovered in the Court of the King, and therefore the land is immediately bound from the time of such recovery; and there is no inconvenience that the judgment in a private cause should bind the lands from the time of the judgment, as it did before in the King's debt, since they might search the records of the King's Courts for the one as well as the other.—Gilb. Exon. 38. Trust estates were not liable upon a judgment against the *cestui qui trust* till 29 Ch. II. ch. 3, which rendered liable all such estates at the time of execution sued, wherefore the judgment did not bind them.—Com. Rep. 226. It cannot be inferred from C. B. Gilbert's writings, taken together, that he conceived the lands were bound, merely because the plaintiff had an election, and such, in my humble opinion—though it may be one—is not the only one, or principal reason. A better reason is found quoted above, from page 38 of Gilbert on Execution. If the lien only operates awaiting plaintiff's election, goods would be equally affected, and the election being made, would determine it, yet it has been decided that goods are not affected—that after electing other executions he may resort to the elegit,

or he may delay for years and then proceed.—Com. Dig. Exon. H.; Com. Dig. Process. E.; West on Extents, 123-9. There is no process to compel him to elect. An action on the judgment does not waive the lien, or he may proceed after the death of the party. If an *elegit* comes upon a statute, and another upon a judgment at the same time, the sheriff must execute the one upon the judgment first, being upon record; and after an *elegit* executed upon a judgment it may be superseded by a subsequent *elegit* upon a prior judgment.—1 Salk. 80; 3 B. & P. 327; Hob. 196. In cases of voucher upon a warranty or upon a *warrantia chartæ* (I will not stop to define the nature of those proceedings), lands are bound or made liable from the commencement of the action, as they were at common law, as against the heir sued upon his ancestor's obligation, and it was at one time contended that the stat. West. 2, ch. 18, had the like extended effect.—Gilb. Exon. 38. It is worthy of diligent observation, that the lands of the vouchee shall be liable to the warranty that the voucher hath at the time of the vouch, for that the voucher is in lieu of an action; and in a *warrantia chartæ* the land which the defendant hath at the time of the writ bought, shall be liable to the warranty.—Co. Lit. 102, b, 289, b. Upon a judgment in debt the plaintiff shall not have execution, but only of that land which defendant had at the time of the judgment, for that the action was brought in respect of the person and not in respect of the land, but otherwise, if bringing an action against the heir, he alieneth, being brought against him in respect of the land.—*Vide* 1 Vent. 360; 3 Ea. 432, 444; 7 Co. 38; 6 Co. 78; 1 Co. 106; 4 B. & C. 414; Cro. Jac. 449; Poph. 132.

Two distinct points should be kept in view. One relates to the responsibility of lands to the debt of a King or a subject, at common law or by statute. The other respects the effect of a recorded judgment for such debt as a lien operating upon such lands as (at common law or by statute) were liable to satisfy the same, whether by extent, *elegit* or sale. These having been imperfectly considered, the method used in enforcing such liability and lien are next to be regarded.

Ancient executions should be distinguished as they were in the King's Courts or in the Courts of Inferior Lords. In the former the money itself might be levied upon the party against whom judgment was given. In the latter, distresses only could be levied—a pain to force obedience to the lords' commands. The origin and history of distresses may be found in Gilbert's excellent treatise on that subject. In the King's Courts the goods were not taken as a mere pain. In these courts the property was altered—not so in the Lords' Court. In the King's Court, between party and party, the execution was only upon goods, but in the King's case execution could issue as well against lands. The debtor was, as in the case of a subject, considered merely bound in person; but as a feudatory, who held mediately or immediately of the King, he was thence to satisfy what he owed the King—they first tried twice (it is said) to levy on his personal estate before they seized the lands. For a subject there was at common law only a *lev. fa.* and a *fi. fa.* The *capias* and *elegit* came in by statute. The former were at first used indistinctly, as tantamount to one and the same thing; eventually they obtained a definite distinction. The *levari* was in the courts below, under which levy was made, and afterwards a sale by prescription, but formerly by the King's original writ (not judicial or issuing from any record) *de executione judicii* or *fi. fa. executionem*. The *levari* in courts above was either upon a recognizance or on the King's process. In the King's case the first process was an *haberi* against the goods, resort to the lands being by Magna Charta restrained till the goods were exhausted, then a *levari* followed, extending the profits of the lands as well as goods; thirdly, the lands were extended. The *fi. fa.* related not to the profits of the lands, but merely to the goods. So when the goods were aimed at, a *fi. fa.* issued; when the emblements, a *levari* was the process. The stat. West 2, ch. 18, giving the *elegit*, has pinned down the difference, and made the *fi. fa.* a specific writ of execution. The *levari* remains for the recognizance, notwithstanding the statute. Bearing in mind that by 13 Edw. I, ch. 18, an *elegit* against lands was authorised, and by the statutes

Merchant and Staple other process of execution, the one against a moiety the other against the whole, it is laid down that the *levari* was the most ancient judicial process, and now continues only in three cases: 1st. In the County or Manor Courts; 2nd. Under recognizances in Chancery, as upon the statutes Merchant or Staple; 3rd. Against the heir on the lands of his ancestor by descent.—Gilb. Ex. 27.

The *levari* out of Chancery was an original writ. West. 2, ch. 18, broke the executions into a *fi. fa.* and *elegit*, both judicial writs being grounded upon the judgment. Upon judgment of record the *fi. fa.* was against goods, &c.—*elegit* to extend the goods and a moiety of the lands. Goods are only bound from the teste of the extent or other execution, whether at the suit of the crown or a subject, and as to *bona fide* purchasers only from the time of actual delivery of the writ to the sheriff. A lease (that is a term for years), though it may be extended for the King's debt or upon an *elegit*, or sold at the suit of the King or a subject as chattels, is bound only as a chattel and not by the judgment. Under West. 2, ch. 18, one-half only of lands can be extended, but where of little value, equity may decree a sale thereof.—Tidd, Pr. 1075, 1079; 8 Co. 171; 2 Atk. 610; Amb. 17; Hob. 195-6; 2 Saund. 7; 2 Inst. 394.

If the King's debt be subsequent to the subject's by statute Staple or Judgment, and the King extend the land first, the subject shall not by any after extent take the land out of his hands; but if such judgment be extended, and the subject has possession delivered to him by a *liberato*, he shall hold, but not if the King's extent came before possession, because the King's debt is in the nature of a feudal charge, which if it comes on the lands before the property of them is altered, it seizes them as it might have done for the original service.—Hard. 23, 27. Between subject and subject, a prior judgment shall supersede an *elegit* execution under a subsequent one. I do not find any case deciding whether a lease, being extended by *elegit*, may be sold as a chattel by a creditor, subject to the lien created by the *elegit*. Such being the law of England, the next object is the application of those principles to this colony. At present we

enjoy the law of England, and lands are held in free and common soccage, subject to the innovation occasioned by 5 Geo. II., which, by appeal in the last resort, has been decided to have force of law here. That statute includes both King and subject, but it does not enlarge the remedy against lands, except as respects debts, duties and demands owing to his Majesty or some of his subjects.—Dyer, 26. An alien might extend lands upon a statute Merchant or statute Staple, and, I should suppose, was equally entitled to an *elegit* under a judgment, but he could not sell lands under 5 Geo. II. unless so circumstanced as to be regarded as and entitled to the privilege of a subject within the act. So a judgment might be recovered by a subject for causes of action not forming any debt, duty or demand owing by the defendant to the plaintiff at the time of action brought, though perhaps liable to be so regarded after judgment, or to be so made by action founded on the judgment itself. When the English law was introduced here, the 5 Geo. II. may be supposed to have prevailed or to have come into simultaneous operation. Being concurrently in force, the one can hardly be regarded as superadding to the other; but with the English law in general we embraced the law of real property, and of judgments and executions, and it is, I believe, not doubted that by virtue of our first provincial act a judgment entered binds lands, as between the parties, from the first day of term, and as respects purchasers, from the date of entry and docket; and I take judicial notice that in this court a docket is kept. The difficulty arises in determining the extent to which they are bound. It would seem apparent that real estates are bound and liable in the same way and to the same extent as in England. They are also liable to a further extent. I see no objection to a party pursuing either remedy, at election. The 5 Geo. II. is affirmative, and does not necessarily alter the previous law—it superadds; but it has so far a negative effect, that the remedy it affords must be pursued as therein prescribed. If the creditor proceeds by *elegit*, or against the heir on a specialty, well and good, but he does so liable to the rights of others under 5 Geo. II. In pursuing

this course in England, he could in no case sell, but merely extend the land, after which another creditor might take the reversionary interest under 5 Geo. II. The priority of judgment would hold between all parties acting under the law of England ; and such priority might in all cases be sustained justly until an actual sale took place—in which event, whether upon the older or junior judgment, the property being changed absolutely and treated as a chattel, no other creditor could afterwards interfere, of whatever date his lien might have been, any more than he could extend a lease, which he at one period might have done, after it had been sold in execution. The same view extends to him ; a simple contract creditor might dispose of the lands at any time before a specialty creditor obtained an actual lien in law upon them as against purchasers, and the heir might protect himself by plea in the first instance, or *puis darrien* continuance, as the case might require. The only question would always be to determine who had the preference in point of actual lien, and right to execution ; and in general a broad rule might be laid down and applied. But if creditors had not both remedies, that authorised by 5 Geo. II. must prevail. Admitting them to be concurrent—as I incline to think they are—it follows that for *elegit* the judgment binds as in England ; and that as against the heir, he is personally responsible in case of alienation before suit, and that the lands descended are bound upon judgment against him or his ancestor. If so, it seems to me to follow that they are equally bound under 5 Geo. II. Conceding for a moment that by West. 2, c. 18, lands are bound by reason of plaintiff's right to elect execution—being so bound when he comes to elect, he may elect a *fi. fa.* to sell, a moiety at least—but the 5 Geo. II. gives, instead of taking away any election ; it leaves the usual legal remedies untouched, which necessarily afforded a right of election. But I do not think that West. 2, c. 18, operated as an immediate lien for that reason, but because a debt was recorded, for which a moiety of the land was made liable. The land became liable and attendant upon this judgment from that

time, just as in the King's case. Statutes Staple, &c. also bound lands; they were passed subsequently to the other, and expressly declare the relation of the lien, manifesting the opinion and intention of the legislature in both cases; and they are not held of equal solemnity with judgments of record, which latter shall be preferred by the sheriff upon concurrent executions.—Hard. 26; Hob. 196; 2 Inst. 394.

The King's debts bound lands, as explained by the law of England—the whole were bound—and if so, why might not the King elect to sell by a *vend. exponas*, as well as to extend them for the profits. Indeed, in 1732, lands might be sold in England for crown debts; and since the 25 Geo. III. facilitated the remedy, I do not find that lands are less bound for the purposes of sale than they were originally for an extent or *levari*. The origin of the lien was the same, and continued—the remedy was enlarged. So as to subject and subject, the origin of the lien is not affected—but the remedy is extended. The King's name was properly introduced into 5 Geo. II. because the English law might not prevail in all the plantations; and before 25 G. III. facility was required where it obtained. It is said the 5 Geo. II. makes lands, chattels, *quoad* debt. I do not think so. It places all real estate upon the footing of personal estate, as to sale and process of execution. The legal character of real estate in any colony, as a matter of property, must depend upon the local laws upon that subject, independent of 5 Geo. II., and a perusal of the first part of the clause will shew that the lien and liability was one thing, and the means of enforcing them another. It says, all lands and real estate, &c. shall be *liable* to, and *chargeable* with—the first word is imperative, the second contingent; the first says that they shall be liable, the second that they shall be chargeable; not that they being liable they shall therefore be charged: otherwise it might be contended that, as in the King's case, in some instances lands became bound by the very contracting of the debt, and the King and subject being united in the act, certainly affords to the latter the most beneficial construction. The extent to which lands are liable and chargeable, in spite of the owner, becomes

more important in cases of alienation by heirs or devisees, before action brought or recovered, when it is rendered questionable whether they can be followed in the hands of *bona fide* purchasers, and if not, whether recourse remains to the creditor by simple contract against the party alienating.

Being at any rate liable, they are also chargeable with all just debts, and the question is—when do they become charged? The stat. 29 Car. II. ch. 3, requiring the date of entry to be noted in judgments, expressly speaks of lands to be charged thereby. The word charged, as used here, means bound. Plowden speaks as if the land was not charged by a recognizance, &c., but chargeable only. It was so in the sense in which he spoke; but he says it was bound and chargeable at election, and I see no reason why a similar election should not accrue under 5 Geo. II.—6 Co. 79; Plow. 72; 10 Co. 50; Cro. El. 552; Hob. 45.

But, to admit the case noted to the full extent, the 5 Geo. II. made the lands liable and chargeable—if they were liable, *i.e.* liable to be charged—of course it was in law, though not expressed in the election of the creditor, to charge them or not; and if he had an election, the arguments drawn from C. B. Gilbert's observations respecting West. 2, ch. 18, would apply in favour of a judgment binding the lands that were liable, in order that the creditor might make election. The other reason also prevails with full force. Under 5 Geo. II. they become immediately liable to be charged. Although the land may not be charged by a judgment, yet it is made liable, and being liable, becomes debtor upon entry of judgment.—Amb. 469.

The 5 Geo. II. does not merely declare that lands shall be liable to be sold as personalty, but that they shall be liable to all debts chargeable therewith, and liable to like process as chattels for sale. A double liability is expressly mentioned—1st. A liability for the debts; 2nd. A liability to be sold by a peculiar process. The 29 Car. II. ch. —, sec. 10, renders trust estates descended assets, and declares that the heir shall be liable to and chargeable with the obligation of his ancestor, for and by reason of such assets, as fully and amply as if an ordinary fee simple had descended.

In other colonies judgments bind lands—as Barbadoes. In St. Vincent, by a local act. In Dominica they are bound by execution, but lands are liable to be sold upon the warrant of a judge of the Common Pleas, for satisfaction of small debts decided in a summary way by an act of 11 Geo. III. In Tobago it is implied, though it is also implied that lands, trust estates at least, are only tangible through the heir. In Montserrat judgments bind by local law. In Nova Scotia, New Brunswick and other colonies, the lien arises by implication, from the local legislature adopting in detail the Statute of Frauds, 29 Car. II. ch. 3, and enacting that, as to purchasers, lands should only be bound from the actual date of the entry. The same act is adopted here in general terms; and all the English acts on the subject of judgments and executions, &c. as a lien, must be construed as if expressly repeated and enacted by our legislature with a knowledge that 5 Geo. II. was in force and made lands saleable; in other words, as if 5 Geo. II. had been included with them. This consideration seems to me to settle the question. When we adopted 29 Car. II. ch. 3, lands were not only liable to be extended, but sold. The circumstance that a subsisting judgment attaches as a lien upon after acquired lands, strengthens my view of the subject. In real actions at common law, the lands were bound in some cases from the suing out of the original writ, in others from judgment, and the judgment subsisted a year, within which execution might go, which execution would relate to the judgment. The same principle applies to a judgment in debt, when the land is liable—made debtor by law.—Roscoe, 341; 3 P. W. 170; 2 Bur. 711, 123.

The right of immediate election being postponed by our statute, and the exhaustion of the goods being made precedent, strengthens all the arguments in favour of a present lien, for if not, as said in Gilb. Exon. 8, as to the King—pending the proceedings against goods—the lands would always be sold by a fraudulent debtor, and though sold in fraud of the creditor by him, might be *bona fide* purchased by another not bound to search for judgments. The omission of a registry in the Register Act proves nothing, because

if bound as to an *elegit*, there would still have been the same reasons for registry here as in England. The Forfeited Estate Act, 59 Geo. III. ch. 12, sec. 7, recognizes judgments and recognizances as binding upon lands—a recognizance of bail is supposed to have such effect. Judgments have priority also in course of administration in each of the foregoing instances, because they are records. A judgment in general terms is equivalent to a recognizance in special terms—that is, that the debt shall be levied of the goods and chattels, lands and tenements of the debtor, and the judgment should be regarded as if so expressed. When so expressed, the common law decides that goods are not bound except from the teste of the execution, but that lands are bound from the entry of the judgment, subject to certain exceptions since introduced in favour of purchasers.

In my view, touching the construction, distribution and effect of 5 Geo. II., it is not necessary to discuss critically the latter clause, authorising the sale of lands, as compared with the first or with the English acts. They are made saleable by the like remedy, proceeding and process, and in like manner as good—that is, they are liable to be seized, extended and sold in like manner as goods are. The remedy consists in a creditor having recourse against the goods by distress or sale, as the case may be. The proceeding consists of the steps, judicial or otherwise, by which such remedy is pursued, and the process is the writ, warrant or other legal authority by which such remedy is under the proper proceedings ultimately enforced. The remedy, process and proceedings against lands is assimilated to those against goods, but they have no inseparable or other connection and relation, and when lands are to be sold, &c. in like manner as goods, the whole clause together shews that in like manner, or by the like remedy, proceeding and process by which goods are seized, extended, sold, &c., so in the same manner may lands be seized, extended or sold. If goods can only be seized, lands can only be seized; if they can be merely extended, so of lands; if liable to be sold, so are lands also; but it does not follow that if goods are only bound from the teste of the writ, so only are lands,

as being subject in like manner. The lien depends upon the previous clause, the latter clause relates only to the seizing, selling or extending; if they are blended, it is calculated to lead to fallacy; if kept separate and distinct, as they ought to be, the lien will be found to be one thing, and the remedy, proceeding and process of sale another thing.

I am of opinion, therefore, that, subject to the provisions of the statutes 29 Ch. II. ch. 3 & 4, and 5 W. & M. ch. 20, a judgment in this court binds lands in this province for the purposes of sale, under 5 Geo. II. ch. 7, or of an elegit, under West. 2, ch. 18, to the same extent as a judgment in the King's Bench in England binds lands for the purposes of extent, under the last mentioned statute. I am not, however, to be understood as intimating that the former decision of this court to the contrary, should be overruled, unless by a court of appeal.

The effect of district court judgments is next to be considered. These courts, like many inferior courts in England, are courts of record, being so declared in express terms by the statute 2 Geo. IV. ch. 2; their judgments are records, and they may issue execution thereon. They are also not only courts of record, but his Majesty's courts. This court, as far as its jurisdiction extends, answers to his Majesty's superior courts of record at Westminster. The district courts resemble inferior courts of record, which are also King's courts. They can only issue execution within the limits of their jurisdiction—though it has been held that their judgments are removable into this court by *certiorari*, under 19 Geo. III. ch. 70, sec. 4, that executions may thereon issue, in the same manner as in judgments obtained in this court. Whatever process of execution it may be competent to inferior courts of record to issue in England, it has never been doubted but that it is competent, as it ever has been the universal practice for the district courts here to issue writs of *fi. fu.*, at least for the sale of goods, precisely as in this court.—2 Vern. 89; Freem. C. C. 103. And it is clear, that as a court of record, its judgments are entitled to priority as such in course of administration, subject to the provisions of 4 & 5 W. & M.

ch. 20, sec. 3, in favour of the administration, which statute, however, only extends to the superior courts. The stat. West. 2, ch. 18, grants elegit when a debt is recovered or acknowledged in the king's court. The district courts are doubtless king's courts—but should that statute be restricted to his Majesty's superior courts, still 5 Geo. II. ch. 7, emphatically enacts in general terms, that the lands in the plantations, belonging to any one indebted, shall be liable to and chargeable with all debts owing to his Majesty, or any of his subjects, and shall be subject to the like remedies, proceeding and process, in any court of law or equity in any of the said plantations, for seizing, extending or selling the same, towards the satisfaction of such debts, &c. in like manner as personal estates therein are seized, extended, sold or disposed of, for the satisfaction of debts. Taking the whole together, it seems impossible to say that lands may not be sold under district court process, founded upon a judgment therein. If so, the effect of such judgments as a lien are next to be considered. From what has been said, it seems to me to follow that such judgments *inter partes* bind the lands precisely as judgments in this court do, without regard to the statutes in favour of purchasers—that is, from the time to which they relate in law, sometimes important—as where, after the death of a defendant, a relation to the time he was living becomes material. Then, as respects purchasers, the 29 Car. II. ch. 3, secs. 14 & 15, provides that any judge or officer of any of his Majesty's courts at Westminster, that shall sign any judgment, shall set down the day of the month and year upon the record which he shall sign, to be entered also in the margin of the roll of the record when such judgment shall be entered; and that such judgments, as against purchasers *bona fide* for valuable consideration of lands, &c. to be charged thereby, shall be judgments only from such time, and shall not relate to the first day of term; sec. 16 enacts that writ of *fi. fa.* shall bind goods from the delivery of the writ to the sheriff only. This act obviously contemplates, in secs. 14 & 15 at least, the superior courts. The 4 & 5 W. & M. ch. 20, recites damages to purchasers, &c.

by judgments entered upon record in his Majesty's courts at Westminster, from the difficulty of finding such judgments, and requires judgments in those courts to be *docketed*, and no judgment not docketed shall affect lands as to purchasers, or have precedence in administration. This act is also confined to the superior courts at Westminster; and it is said, that though by reason thereof judgments are placed upon the footing of simple contract debts unless docketed, yet that executors or administrators must still notice judgments in inferior courts of record, not docketed.—6 T. R. 387; 1 B. & P. 307; 11 Vin. Ab. 294; 3 P. W. 117; Toll. Exors. 269 Office Exors. 139.

If lands are bound by judgment, by virtue of 5 Geo. II. ch. 7—that is, if they would be regarded as so bound, supposing that no recourse to an *elegit* existed, and I think in this province, under the laws of England, they would be so bound in this court—then the provisions of the statutes of Charles, and William & Mary, must be applied to such judgments in this court.

I am not prepared to say that lands are extendable under an *elegit*, by virtue of the Stat. West. 2, ch. 18, in such inferior courts, but rather think they should be regarded exclusively under 5 Geo. ch. 7; but if West. 2 extends to them as well as 5 Geo. II.—indeed in either case—I am disposed to think, taking all together, that as respects *bona fide* purchasers for value without notice, the judgments in those courts do not bind the lands until execution be issued against the same and be delivered to the sheriff, in analogy to like process against goods, because they have no dockets that we are aware of—and if they had, the stat. Charles, and William & Mary, do not extend to them—and it seems unreasonable that a judgment of the superior court should require additional solemnities to affect purchasers, and that less would suffice in an inferior jurisdiction. At all events, in the present case the sale by the sheriff cannot on the evidence defeat the sale to the lessor of plaintiff, for the writ of execution does not bear relation to the judgment, and if on the face of it it has no retrospective reference, it will not operate to authorise or direct a sale at any time antecedently

to the teste. Then again, could a docket be supplied, I am disposed to think the proof of it should come from the defendant, for without it the judgment *per se* would not bind as against a *bona fide* purchaser; and although in 1 B. & P. 307, the omission of it was replied to a plea of judgment recovered by an executor.—16 Ves. J. 425. The principle of this demise and the case in 6 T. R. 384, seems to argue that the proof of docket must be added to the judgment, when without such docket the operation of the judgment is restrained.

Per Cur.—Postea to the plaintiff.

DOE EX DEM. JONES V. CAPREOL.

A court of law has power to set aside a deed, where a jury finds that actual fraud has been practised in obtaining it, and although mere inadequacy of price is no ground for impeaching a conveyance, yet, when taken in connection with the mental imbecility of the party executing it, it goes strongly to prove fraud.

Ejectment for lots numbers 21, 22, 23 and 24, in the third concession south of Dundas-street, in the Township of Toronto. The King's letters patent, dated 23rd July, 1833, to the lessor of plaintiff, were admitted, and there the plaintiff rested his case. On the defence two deeds from the lessor of plaintiff to the defendant were produced, dated 12th May, 1834, one for the premises in question, the other for 270 acres of land in the Township of Tossorontio. The consideration of the first deed was stated therein to be 50*l.*, and 20*l.* was stated to be the full consideration for the other. Law, one of the subscribing witnesses to these deeds, stated that he drew these deeds upon the instructions of the defendant—the lessor of the plaintiff was not present—defendant told witness he had paid 50*l.* into the bank for Jones, and wished witness to draw the deeds as quickly as possible. Defendant came about five in the evening for the deeds—they were ready—and the witness accompanied defendant to the Ship tavern, where Jones resided—they found Jones in bed. Turner, the landlord, shewed them up to his room, but objected to be a witness to the transaction; the defendant went out and fetched Keating. Jones's servant was in the room, but left it when they went in. Turner is sup-

posed to be drowned. He told Law he would not witness the transaction, that Jones was selling his land too low. The witness knew of no consideration, except that paid to the bank; he had seen Jones sometimes sober, sometimes otherwise, but never in a situation unfit for business; Jones was not drunk when witness saw him in company with defendant—he was in bed, in anticipation of an attack of gout. In about fifteen minutes defendant returned with Keating, and the deeds were executed. Jones died afterwards. He did not see Jones sign any receipt, but heard him acknowledge a receipt which he had signed on a separate paper before the deeds were executed; he was certain Jones knew what he was about when he signed those deeds. During defendant's absence, witness conversed with him about it; Jones spoke of money which defendant was to pay him through his wife in England; that he (Jones) was going to England, and thought he should receive the money there. Witness thought that if the money said to be in England were forthcoming, it was double the worth of the land; he thought the transaction fair and *bona fide*; he was at the house about four hours after the deeds were executed; Jones's servant came down for some brandy, and said he had taken up brandy to him twice—about three half-pints. A paper was produced signed by Capreol, the defendant, undertaking to forfeit 1000*l.* if he did not furnish Jones next day with a transfer of stock; defendant's wife is about twenty years old, and the stock purported to be hers. Witness understood Jones wanted money to take him to England, and when there he would have these funds. Keating, the other subscribing witness, states he thought Jones sober, and in a state to transact business when the deeds were executed; he was in bed, stated that he had been poorly, but was then better; no money was paid in witness's presence; a paper was read, and some talk of money to be paid next day; defendant afterwards told him he was sure he could hold the property, and asked witness whether Jones was not sober. John Francis was called to prove an agreement between Jones and defendant two days before, for the sale of this

land. Jones came to witness's house on Saturday with defendant; he was sober and knew what he did. Witness heard defendant was to give 50*l.* and the third of some property in England. Jones signed the agreement at witness's house; he remained there till the next day; it was about twenty rods distance from Turners, where Jones lived; the agreement was signed in a bed-room; Jones complained of rheumatism. Witness heard there was brandy up stairs with him, but did not see him after he signed the agreement before he went; defendant and his wife were with Jones during the evening.

To rebut this evidence, and impeach the deeds produced, the plaintiff's counsel called several witnesses to shew that the deeds were fraudulently obtained by the defendant when the lessor of the plaintiff was incompetent to execute them, either from intoxication or from unsoundness of mind, produced by a long continued habit of gross intemperance, to which he afterwards, and very shortly, fell a victim. It appeared that the defendant, immediately on having the deeds executed, hurried up, accompanied by Law, to get possession; that on the day following the obtaining the deeds, he was asked by a neighbour who called (not knowing of the sale), what he had paid per acre—to which he answered, perhaps five or six, perhaps fourteen, perhaps twenty-one dollars an acre—he could not tell; that defendant stated he had taken Jones to his own house to keep him sober, in order to make a bargain with him, and had given him one glass of brandy and water, but forgot to take away the bottle in the evening—and by morning Jones had drank the whole; that there seemed to be some disturbance after the deeds were executed, and he thought it better to take immediate possession; that his deed was registered, and he would stand a suit. The medical attendant of Jones proved that he attended him about the period in question; he was in a very debilitated state from hard drinking—had delirium tremens—was sleepless—and had been under the influence of liquor for a long time; this was on the 13th May 1834, the day after the deed was executed; on that day his intellects were decidedly weakened

—so much so as in the witness's opinion to render him incapable of exercising a sound judgment ; there could be no mistake in the disease, nor had the witness any doubt but that Jones had been drinking hard for some days before. On the 13th May he was not in a state of mind to transact business—though he might have been made to understand the object of a deed to convey land—but he could not have dictated a will ; witness could not say whether his memory was impaired—his judgment certainly was ; delirium is sometimes brought on by a sudden cessation of drinking in a hard liver—or drinking hard on the previous evening might have occasioned it—but he could not positively say what state he was in the night before, nor safely infer it ; on the 13th he was not at all intoxicated, but suffered greatly. Jones's servant proved the general intemperance of his habits ; that defendant got Jones away from his boarding-house to defendant's, on the Saturday ; witness did not know his master was to be away for the night ; he went to fetch him on Sunday about one o'clock, found him beastly drunk ; saw the empty bottle ; brought him home in the evening ; on the following day defendant and Law came to the Ship tavern ; Jones had been in bed all that day ; defendant ordered witness out of the rooms—he went, leaving Law and defendant with him ; Turner, the landlord, went up and came down again shortly ; witness went up after defendant and Law had left ; Jones burst out crying, saying he had fooled his land away ; said he had received 50*l.*, and what he had sold the land for was to come on Mrs. Capreol's father's death ; Jones had some weak wine and water that evening, and nothing else. An instrument signed by defendant and his wife was then produced, and proved ; the attorney who produced it received his instructions from defendant, who was accompanied by Law ; they were in a hurry for it, stating that Jones was going to England immediately ; defendant said he had purchased Jones's land, and the deeds were gone to be registered, and that he had given full value. The purport of this instrument was, that defendant, in right of his wife, was possessed of an interest in the funds in England, in the

following manner : that his wife, as one of three daughters of John French Styring, was jointly with her sisters entitled to receive 2,184*l.* three per cent. consols, upon the death of their father, under the will of one John French, deceased ; but no documents of any description were produced to the attorney to enable him to draw this assignment—it all rested on defendant's assertion. It appeared, however, by the evidence of Mrs. Capreol's father, that such an interest did exist, but he (the father) was then only 43 years of age—and Mrs. Capreol was, at the time of the trial, in her nineteenth year. The father said that this stock had been bequeathed to trustees, who paid him the interest during his life, and at his death the principal was to be divided among such of his daughters as were then living ; so that if Mrs. Capreol died before him, her share would go to the other sisters—or if she survived, and the other sisters died in the father's life, she would take the whole. It further appeared that this 50*l.*, said to be paid by defendant to Jones, was paid into the bank in satisfaction of a protested bill of Jones's. The land was differently valued by different witnesses—by some at 4*l.* per acre, by others at much less. A medium estimate, founded on the whole evidence, would make it worth 600*l.* or 700*l.* Many remarks of defendant were proved, tending to shew that he thought he had got the advantage and would keep it, without seeking to justify the fairness of his conduct in the transaction. When this instrument was offered to Jones, on the day following the execution of the deeds by defendant, Jones, under the advice of Turner, did not accept it. Defendant swore he did not care a pin for Jones, the thing was done, and went off, leaving it ; Turner took it, and gave it into the hands of Mr. Draper, the plaintiff's counsel, on consulting him. Other witnesses, who saw Jones on the 12th, thought him incapable of transacting business. Mr. Taylor, an attorney, in whose hands Jones had lodged a note for collection, was called upon by defendant on the 12th of May for it. It was a note for 50*l.* given for timber cut on this land. Defendant told Mr. Taylor that Jones was selling his land, and the purchaser was to have the note. Mr.

Taylor asked who was the purchaser—he replied, no matter; got the note and gave a receipt for it. Afterwards, he tried to get Mr. Taylor to accept the assignment of the interest in the funds, as Jones's attorney. Mr. Taylor refused, saying there was nothing to prove the truth of it—it might be a fabrication—and he did not think it any good consideration for Jones's land. Defendant said he did not care, he had registered his deed, and would keep the land. Defendant had in other conversations given parties to understand that the funded property would be available to Jones immediately on his arriving in England. Some evidence was afterwards called for defendant, to prove Jones in a state capable of transacting business. The Chief Justice, who tried the cause, charged the jury that before they could set aside the deeds advanced by the defendant they must be convinced either that Jones was, at the time of executing them, absolutely incapable from unsoundness of mind of doing the act imputed to him, or that, although he might not be absolutely *non compos mentis*, in the general sense, yet that being of weak intellect, from intoxication or disease, the defendant artfully practised upon him, and seeing his infirmity of mind, inveigled him into a catching bargain. That mere inadequacy of price was not a ground for setting aside a deed at law, but that in cases of this kind it might form an important feature, as being evidence of fraudulent imposition, and tending to strengthen the opinion that the seller was incapable of contracting; but that where there was no doubt of the vendor's capacity, then inadequate consideration became immaterial, unless indeed as combined with circumstances of actual position, fraud in the purchaser, in the representation of something false or the suppression of a material fact. That he (the Chief Justice) saw no misrepresentation by the defendant; that Jones seemed to have relied on his mere statements as to the money in the funds, and that those statements were not shewn to have been otherwise than true; that it was, to be sure, a most important circumstance that Mrs. Capreol was not of age when she signed the transfer of stock, (which Mr. Jones, when it was tendered to him on the 13th

of May, refused to receive), but that there was no proof of any intended deception in this respect; no question had been asked or any statement made on that point, and it was perhaps too much to hold that the defendant must necessarily have been aware of the legal consequence of his wife being a minor, and must have intended to conceal the truth in that respect; that all rested upon the mental capacity of the party at the time to contract, and upon the conclusion which they might come to as to the fraudulent imposition of a bad bargain upon him, when he was not in a state capable of protecting his interests. The jury, after an hour's deliberation, found for the plaintiff; and in Michaelmas term last *Sullivan* obtained a rule *nisi* to set aside the verdict and grant a new trial, on the grounds of misdirection, that the verdict was against law and evidence, and the discovery of new evidence since the trial. In Hilary term the case was argued at length by the *Solicitor General* for the plaintiff and *Sullivan* for the defendant, and now judgment was given.

ROBINSON, C. J., (after stating the case).—I cannot say that I see any reason to be dissatisfied with the verdict, either in regard to the law or facts of the case, and I am of opinion that the rule should be discharged.

In the first place, as regards the conclusion which the jury came to upon the question of incapacity: Upon the direction which they received they found their verdict for the plaintiff; they did not state, and they were not called upon to state, whether they did so upon the conviction that Jones, when he executed the deeds, was absolutely *non compos mentis*, or upon the conviction that not being absolutely and to the full extent *non compos mentis*, but of weak and disordered understanding, from intoxication or disease, the defendant had fraudulently practised upon his weakness, and imposed a bad bargain upon him knowingly, taking advantage of his mental imbecility. We cannot infer upon what conviction their verdict proceeded. It is known only to themselves. If, however, they had declared that upon the evidence they considered Mr. Jones to be absolutely of unsound mind, in the proper legal sense of the

term when he executed the deeds, I should not have consented to set aside their verdict as against evidence. There is much in the evidence, I think, to warrant that conclusion. A highly respectable physician, who was called in to attend Mr. Jones on the 13th May, (the day after the deeds were signed), stated that he found him in a most deplorable condition, suffering the horrors of delirium tremens; that he was in a very debilitated state, from hard drinking, had not slept, and had been under the influence of liquor for a long time; that he found his habits so abandoned he could do nothing for his relief; that his intellects were at that time decidedly and materially weakened, so that he was not capable of exercising a sound judgment, though he was not then intoxicated. And besides, independently of the state to which his mind had been brought by the effect of his long continued habits of intemperance, the jury may have entertained strong suspicions that he was actually intoxicated at the time that the agreement was obtained from him. A witness swore that he was otherwise, but in the attendant circumstances, and from the whole complexion of the case, there was so much room for suspicion, that I should not wonder if the jury were not convinced that his account might be relied upon.

It was much insisted on in the argument, that Jones being *non compos mentis* was altogether disproved, by its appearing that he knew afterwards what he had done, and so far recollected the particulars of the sale that he spoke of them to others, regretting his folly. That argument is not conclusive with me. To be without intention or consciousness, or recollection, is not the common characteristic of insanity—it belongs rather to the state of the merest idiocy. Many persons have been acquitted of murder and other crimes on the ground of insanity, when it was evident they had long meditated the act committed by them; that they shewed much cunning in availing themselves of an opportunity to commit it, and that they were afterwards fully conscious of what they had done, and even exulted in it. Their insanity is, in such cases, inferred from other circumstances; from their general conduct; from the evi-

dence which they have given of being impelled or misled by some mental delusion, and sometimes by the utter absurdity of the motives assigned by them. To prove them insane, it is not necessary to shew that they were unconscious at the time of the act committed by them, and retain no recollection of it afterwards. I mean by these observations to intimate that if the jury had expressly grounded their verdict on a belief of Mr. Jones's absolute incapacity, I should not have then inclined to disturb their verdict. Upon this point I refer to what is said by the Lord Chancellor in *Bates v. Graves*.—2 Ves. J. 289. In a case like the present, when the verdict, to say the least of it, is in accordance with justice, the verdict of the jury should not be overruled but upon the clearest grounds. We should be satisfied that they have come to a wrong conclusion before we give a party another opportunity of supporting a claim to property under deeds acquired as these were. And that the jury would clearly have come to a wrong conclusion in holding Mr. Jones *non compos mentis* at the time of these transactions, I mean when the agreement was made or the deeds signed, is more than I can take upon me to say ; and if I leaned to the opposite opinion, I would still not be induced to interfere with their verdict.

But it is very possible, and I think it probable, that the jury may have founded their verdict not upon the conviction of Jones' absolute incapacity—but rather upon the conviction that his mind was unsound to a great degree, in consequence of his intemperate habits, and that his weakness had been fraudulently practised upon.

I have stated what direction I gave the jury upon this point ; and the principal doubt with the court has been, whether they were in that respect misled by the opinion formed and expressed by me at the trial. It has been contended by the defendant that if Mr. Jones, when he executed the deeds, was aware what he was doing, he is necessarily bound in a court of law ; that no mental imbecility short of absolute incapacity can avail as a defence ; and that although the practising upon a mind weakened by intemperance or disease, and the obtaining a bargain mani-

festly unequal under such circumstances, may be morally indefensible, still there can be no relief but in equity.

The doubts which the court have entertained upon this point have led to very frequent discussions, and an attentive examination of the question ; but I believe I may say that there is now no difference of opinion among us upon this very important part of the case. It did not appear to me at the trial to admit of doubt, that courts of common law had a jurisdiction in cases of fraud sufficiently extensive to protect persons of unsound mind—though they might not be absolutely and to all intents insane—from being ruined by the artifices of individuals aware of their imbecility and willing dishonestly to take advantage of it, by inveigling them into catching bargains. What belongs exclusively to courts of law, and what to courts of equity, in cases of this description, is an interesting and important enquiry ; and indeed the enquiry is not a little embarrassed by the apparent contradictory language upon this subject in some of the numerous cases—but I have not seen anything in the decisions to occasion difficulty or doubt ; and I think it clear, that the jurisdiction of courts of law does extend as far as the jury were told it extended in this case. One of the most important objects of the law is to protect persons from suffering in their property, either in consequence of mental incapacity or fraudulent imposition, or the exercise of an undue or improper influence, which other persons may possess over them from various causes. The law of England, it will be admitted, attains this object—if not perfectly, which is scarcely to be hoped for, still very effectually—either through the intervention of a court of law or a court of equity. It is most important for us, much more than it can be in England, to ascertain as clearly as possible what are the cases which a court of law can take cognizance of—and what those cases which can receive no relief except in equity—and for this plain reason, that we are absolutely without the means of exercising an equitable jurisdiction, having no court of equity of any kind or for any purpose. Those frauds, therefore, which equity only can relieve against, must be successful ; and consequently, if this

court of common law, when it has the power to relieve against frauds, were to decline the exercise of that power, upon the ground merely that equity is the more proper or more usual or more convenient jurisdiction in such cases, then it would follow that justice would be denied, and for an insufficient reason, because if a suitor can legally receive redress at our hands, it would be illegal as well as vain to refer him, upon any ground of expediency or usage, to a tribunal which does not exist.

This will not be disputed on the one hand, and it must be as readily conceded on the other that a court of common law, confined as this is expressly to the power and jurisdiction of the superior courts of common law in England, cannot legally go one step further than those courts have the power to go upon any pretence of hardship, or in consequence of any defects in our judicial establishments. We may in some cases interpose, where a court of common law in England, in the exercise of its discretion, merely would refer the party to another course—that is, we may do what they frequently may not *choose* to do; but we have no authority to do anything which they *cannot* do.

Now unquestionably there are distinct classes of cases in which courts of equity will, upon certain established principles, set aside deeds and contracts as fraudulent, although there is nothing in the execution of the deed or in the circumstances of the contract which would enable or entitle a court of law to deny its validity. Cases, I mean, in which courts of equity, acting as it does upon the conscience, will not allow the deed or contract to stand, because, from the relative situation of the parties or from the nature of the transaction there is room to suspect the operation of an undue influence, so as to make it safer and more prudent to prohibit such transactions altogether, by inferring fraud and treating them *prima facie* as invalid, leaving it however in the power of the parties to establish their validity, by such evidence as may satisfactorily repel the presumption of fraud in the particular cause. I need not enumerate all these classes of cases. Securities exacted by attornies from their clients, marriage brokerage contracts,

purchases by trustees of the property which they are intrusted to sell, are of the description alluded to, and there are others which come within the same rule. In those cases where no actual fraud is proved and the parties are capable of contracting, and there is no illegal duress, courts of law cannot deny the fact of the contract, and they must and do give effect to it. The Lord Chancellor, however, holds these transactions to be unconscientious, and protects the weaker party by relieving against them.

But the present is a case of a very different description. Actual direct fraud is involved in the imputation of practising upon a man of unsound judgment and shattered intellects, whose degraded habits had destroyed his firmness of purpose, left him scarcely a will to exercise, and brought him to that state that importunity and flattery, or an urgent perseverance might extort anything from him. Notwithstanding early opinions to the contrary, it is now well settled that a man is not precluded at law from stultifying himself, as the term is. He may allege his own mental imbecility, from whatever cause arising, and may claim to be protected on that account from the consequences of acts into which he has been seduced or betrayed.—3 Camp. 33. Neither is it doubtful that drunkenness, or in other words, temporary unsoundness of mind, arising from intoxication, will render invalid a deed obtained from a man in that state, when he appears to have been practised upon. I annex the qualification that imposition must be shewn, because the case seems to me to import that, and in my opinion, upon good and reasonable grounds, which however I will not now take time to discuss. The case now in judgment before us is, in my opinion, very strongly tainted with imposition. The consideration is almost as nothing, compared to the value of the property. No man who could and would exercise an ordinary degree of reason, could have accepted it. The vendor, evidently in a deplorable state of mind, was dealt with apart from his friends or relations, and without the intervention of any professional adviser. Indeed, it is worthy of remark, that the agreement and deeds for this valuable property were prepared and

signed without having recourse to any professional gentleman. Mr. Jones was taken from his own lodgings to those of the defendant and there kept for two days, during which interval the bargain was made and the agreement signed. While he was there he kept his bed both day and night, and was proved to have got drunk by liquor left in his room by the defendant, and to have been taken from thence by his servant home in a state of intoxication. Great haste was used by the defendant in having the papers drawn—then immediate execution was pressed. One person present refused to witness the deeds, upon the ground that Mr. Jones was at the moment lying in that state that he was wholly unfit to dispose of his property. He actually signed them lying in his bed, burst into tears afterwards when speaking of it, and refused to take the transfer of stock. As soon as they were obtained, great haste was shewn in obtaining possession of the property, and in this act the defendant was accompanied by the person employed by him to prepare the papers. The consideration in the deed is stated to be only the 50*l.* which was paid, not noticing the further consideration of the alleged reversionary interest in the funds, and a reason for omitting this was stated to have been assigned by the defendant himself—namely, that he had only mentioned the money consideration in order that the validity of the deed might not be affected by the failure of that part of the consideration which related to the bank stocks. Add to this, that Mr. Jones was found on the next day by a medical man lying in the same bed on which he had executed the deeds, almost senseless and distracted from delirium tremens, in a hopeless state, as he expressed it, and very truly, for he soon afterwards died, having first, however, and as it appears promptly instituted this action (or it may be that his friends did it for him) to regain possession of this property.

I am convinced that a court of equity, upon such facts, would not hesitate to set aside the purchase; but it is contended that a court of equity alone is competent to afford relief, and that in this province, as we have no court of equity, a purchase effected under such circumstances must

stand. It is argued that a court of equity, if it felt it right to interpose, would do equal justice by exacting the repayment of the money advanced, and that as a court of law cannot enforce this condition, it follows that the deeds must be allowed to stand. Upon this point the case of *Bates v. Graves*, before cited, is an important authority. The chancellor might certainly, and it is probable he would in a case like this, decree a recognizance by defendant, exacting as a previous condition that the money paid should be returned; but, in my opinion, there would be no necessity in equity for decreeing a recognizance if the deeds were held to be fraudulent, by reason of actual circumstances of imposition, nor would it be considered in equity indispensable that the money should be returned. And with reference to the power of a court of law in such a case, when in the course of a fraudulent imposition upon a man whose mind was unsound, whether from drunkenness or any other cause, a sum had been paid by the purchaser and accepted by the other before the incapacity removed, and not under such circumstances as would imply a deliberate ratification and acquiescence in the bargain, the finding of the jury upon the issue of *non est factum* can never, I think, depend upon the question whether the sum so advanced had been returned or not before the defence pleaded. If the treating the deed as invalid has the legal effect of entitling the party to receive back his money, he may sue for and recover it; if he cannot legally recover back the money paid by him in the course of such a transaction, then it must follow that he has no legal right to it, and the repayment of the sum can be no necessary ingredient in the enquiry, whether the deed was legally executed or not.—1 Pothier on Obl. 19, 20. The fraud imputed here and found by the jury is fraud inducing the contract—it enters into its essence and makes void the act. And actual fraud, such as has been imputed and found in this case, never was, in my opinion, exclusively cognizable in equity.—2 Wils. 350; 4 Crim. Dig. 406; 1 Burn, 396; 2 Co. 9; 3 Co. 77.

The cases are very numerous in which the jurisdiction of courts of law and equity in cases of fraud is discussed;

in some of which the doctrine is distinctly laid down, that in matters of fraud—that is, actual, positive fraud—courts of law and equity have a concurrent jurisdiction.—4 Bro. P. C. 186, 202, 222, 230, 244, 258, 297; 2 Ves. 155; 2 P. Wm. 156; 2 Atk. 324; 2 P. Wms. 270, 203. It is to be remembered that in this case there is no suggestion or pretence for imagining any consideration arising from blood or affection, or intended bounty; the purchaser was a stranger, and the transaction is either to be supported on the footing of a *bona fide* sale or not at all. In this view, the inadequacy of consideration is the more material, as it applies more forcibly to shew the want of judgment and capacity; for there is no room for inferring a willingness to give the property away, or to part with it to the defendant for a less sum than could be readily obtained from others.

Upon the whole, I am of opinion that this case comes within the description of cases which turn upon actual fraud—not legal fraud, deducible by inference from the mere relative position of the parties—that the validity of a deed under such circumstances is a question for a court of law to try; and that the party imposed upon is not left to the discretion of a court of equity, in granting or withholding relief—but, on the contrary, the legal trial by jury is the more proper course of the two, and must be more favourable to the party to whom fraud is imputed, and is frequently resorted to, as in *Bates v. Graves*, by directing an issue from Chancery when the question of fraud or no fraud seems doubtful.

I believe there is no case where unsoundness of mind, combined with fraudulent practices and imposition, would entitle the party to relief in equity, while at the same time a deed obtained under such circumstances might not be held void in law upon the verdict of a jury. I am not dissatisfied with the conclusion to which in this case the jury came upon the evidence before them, and I think it was as competent to the lessor of the plaintiff to dispute the validity of the deed thus obtained in this action, as it would have been to defend himself against them upon the plea of *non est factum*, if this defendant had not succeeded in gaining

possession, and had sued him upon the covenant for quiet enjoyment. I think also that the circumstance of the money having been paid by the defendant could not affect the question of the validity of the deed. With respect to the alleged discovery of new evidence since the trial, I do not see any ground upon which we ought to grant a new trial upon that pretence. The defendant himself could not, of course, be a witness in the cause—and as to the affidavit of Saunders, who was actually examined at the trial, nothing could be more unsafe or more contrary to practice than to overturn the verdict upon such a ground. It is in the power of the defendant, if he pleases, to become plaintiff on ejectment hereafter, and to submit the case to the ordeal of another trial ; but these affidavits would not warrant us in setting aside the verdict.

SHERWOOD, J., of the same opinion.

MACAULAY, J.—The difficulty I have experienced in forming an opinion in this case, did not arise from any doubts touching the merits, but the jurisdiction competent to grant relief—that is, whether a court of equity alone can interpose, or whether it falls equally within the scope and authority of a court of law. Courts of law and equity have, generally speaking, a concurrent jurisdiction in relieving against fraud ; but sometimes equity goes beyond the law, by presuming or inferring it, under circumstances in which a court of law could not act, owing to the absence of fraud apparent or in fact. When the validity of deeds of conveyance is questioned, one test to determine the point of jurisdiction is to consider whether the circumstances in evidence shew the instruments to have been null and void *ab initio*, so that no estate passed under them—or whether they were not void but voidable, the estate passing until avoidance. In the former case, a court of law would be enabled to take cognizance of the fraud, though not in the latter. The case falls exclusively to equity, where application must be necessarily made, not merely for the delivery up of the deeds as a claim upon the title, but for a re-conveyance to restore the estate, when the purchaser or donor must be regarded as a trustee for the vendor or donor ; when

a *bona fide* purchaser could acquire a title under him; when a re-conveyance is essential, not merely to obviate or prevent scruples on the part of after-purchasers, and as an act of supererogation, so far as the actual interest in the estate is concerned, but as the only medium by which the party imposed upon can be restored to and reinvested with his original rights.—2 Ves. 155; 18 Ves. J. 483; 2 P. Wms. 156; 2 Ves. 627; 1 Ves. J. 36; 3 Atk. 536; 2 Ves. J. 292; 1 Inst. 2556; 4 Cruise, 105; 3 M. & S. 478; 1 J. & W. 333; 5 Mad. 416; 2 Swan. 156, 166; 1 T. R. 734; 4 B. & A. 92; 1 Taunt. 413; 1 B. & P. 270; Barnes, 152; 2 Bro. C. C. 641; 2 P. Wms. 170; 2 Taunt, 640; 3 Bur. 1361, 1420; 1 Bl. 427.

It appears to me that courts of equity infer fraud beyond a court of law in two distinct respects—first, from circumstances not strictly partaking of that character, and over which a court of law can exercise no control—as in transactions between attorney and client, guardian and ward, trustees and *cestui qui trust*, &c. Secondly, from circumstances tending to establish fraud in fact, but not sufficient to warrant a court and jury in so holding—as gross inadequacy of price, or inadequacy combined with weakness, necessity or slight evidence of circumvention. In the latter instances courts of law may equally interpose, when the proof goes far enough or is sufficiently strong.—1 Ves. 36; 2 Ves. 155; 2 P. W. 166; 18 Ves. Jr. 483; 1 Wils. 310; 2 Ves. 14.

Touching specialties in a court of law, it appears to me that though pleadable specially, fraud, lunacy and intoxication may be given in evidence under the plea of *non est factum*, for in any of those events the instrument would not be the deed of the party in law. A special plea would amount to a special *non est factum*, in which case the common plea of *non est factum* suffices, and such cases are to be distinguished from special pleas concluding, and so the deed is void, and not so, *non est factum*.—4 M. & S. 338; Hob. 72, 166; 2 Wil. 347; 9 Ea. 417; 5 Co. 119. The latter is only admissible when the deed is void in *toto ab initio*, as not being the deed in law of the party who executed it; the former is proper when the special facts

disclosed shew the deed void in law, though in fact the deed of the party, though void, as being against law, in contravention of statutes, for immoral considerations, or in furtherance of crime, or made under duress, &c. It follows that when a deed is void for fraud, no restoration of purchase money or other act can at law be required of the party imposed upon, as a condition precedent to his right of repudiation. He must shew the instrument to be absolutely void *ab initio*—if he fails therein, if it once had operation, a court of law cannot rescind it, and it is obvious that a call to refund presupposes that the instrument subsisted as valid till revoked. In many transactions not under seal, affected by fraud collaterally, a relinquishment of advantages may be demanded—the opposite party may require to be placed in *statu quo*, as the only condition of rescision; there no estoppel by deed can be urged, and the fraud does not affect directly but incidentally that part of the transaction to be repudiated. When fraud direct is shewn, all transactions and instruments are alike unconditionally void.—2 Burr. 935-6, 1082. A deed may be affected by fraud directly in its matter or execution—as by false reading, the fraudulent insertion or omission of material matter, lunacy, intoxication, &c.; or collaterally—as in the consideration or inducement. In the former case a court of law can relieve, in the latter, equity only, generally speaking. So that the enquiry in the case before us is—whether the deeds in question are tainted by fraud in their execution—that is, whether they were obtained by fraud direct, and liable to be invalidated upon an issue of *non est factum*. The evidence does not establish satisfactorily that Jones was, at the time of their execution, actually insane or intoxicated, nor does it shew such fraud as would vitiate the deeds, however sound in mind or sober in person he might have been; but it shews great mental debility and unfair practise upon that weakness, reducing the case to the single point—whether these circumstances combined establish such a case of actual fraud as a court of law can deal with. It will be found that where fraud is alleged in obtaining a will of real estate, equity never interferes, but that is always

determined at law as upon an issue of *devisavit vel non*.—2 Ves. senr. 407; 2 Ves. jr. 288; 8 Ves. jr. 66; 1 P. Wms. 288; 9 Mod. 312; 2 Co. 6, 23; 8 T. R. 147; 12 Ves. 445; 2 Ves. 587; 1 Cox, 353; 2 Phillim. 449; 6 Ves. 273; 8 Ves. 65; 19 Ves. 286. Premising that wills are not specialities—that they are revocable—and that the fraud is always urged by a third person, the cases of wills afford much assistance touching the application of analogous facts and circumstances to deeds, *inter vivos*, especially as respects weakness of mind. Touching mental imbecility, it will be found that the Court of Chancery has in modern times extended the practice of granting commissions of lunacy. Formerly they could only be sustained upon proof of actual incapacity or insanity, termed *non compos mentis*, or unsound mind; latterly it has been customary to grant commissions in the nature of a commission of lunacy, when a person is of greatly deficient or unsound understanding though not absolutely insane, under which, however, the jury must find a verdict of unsound mind, to warrant an appointment of a lunatic committee; of course, therefore, the evidence must shew a substantial defect of intellect and an incapacity to the management of the business of life. Now lunacy is a good defence in law under the plea of *non est factum*, especially if any undue advantage hath been taken of the afflicted party. And although it does not appear that the rule of law has been expanded, so as to keep pace with equity, still it being held that there is no such thing as equitable incapacity when there is legal capacity, it may be argued *e converso* that there cannot be legal capacity when there is equitable incapacity; in other words, that the same facts which would warrant a jury in rendering a verdict of unsound mind under a commission in the nature of a commission of lunacy, would authorise a similar finding upon any trial at law, in which the mental capacity of the person was put in issue.—3 P. Wms. 129; 6 Ves. 270. The old notion that no one could be suffered to stultify himself or prove his intoxication, seems exploded; indeed, either insanity or inebriety would appear admissible as proving fraud in the other party if he had knowledge

of its existence, particularly if he took any unfair advantage of the person in such condition.—1 Ld. Ray. 318; 2 Str. 1104; 3 Campb. 126, 33; Bul. N. P. 172; 1 Stark, 126; 7 D. & R. 616; 1 M. & M. 106; 2 C. & P. 178; 3 C. & P. 30; 5 B. & C. 170; 18 Ves. 16. It is said to be a fraud in itself to deal with a person known to be a lunatic or drunk, to his obvious prejudice. It is further to be observed, that weakness of mind with circumvention or gross inadequacy, though such weakness would not sustain even a commission in the nature of a commission of lunacy, will make a case for relief in equity; and I am disposed to think, that where such weakness is shewn as would support such a commission, and fraudulent acts of circumvention are superadded, relief will be afforded in law, although the facts imputing fraud, abstracted from the mental weakness or applied to one of sound and perfect understanding, would not of themselves amount to fraud in fact in a court of law.

Turning then to the evidence, it appears that two questions were submitted to the jury by the Chief Justice: 1st. Whether Jones was actually of unsound mind, as an abstract fact. 2d. If not, whether his faculties had been weakened by intemperance; and if so, whether the defendant, knowing this, had or had not practised upon him and inveigled him into a bad bargain, when he was not in a state to protect his interests. Of the latter, I think from the verdict the jury must have been satisfied; and I conceive the evidence affords sufficient proof of overt acts of circumvention, exercised towards one of weak mind, to annul the deeds so obtained at law. In the first place, I think that from his general habits Jones had reduced himself to such a state of debility, both of body and mind, that a court of equity would readily have granted a commission, in the nature of a commission of lunacy, and that a jury would have felt no difficulty in finding a verdict against him of unsound mind and incapacity to manage his affairs; and I lay stress upon the consideration that his weakness was so great, because it enters materially into the opinion I have formed. It appears from the whole tes-

timony that Jones being in this lamentable condition, and addicted to habits of gross intemperance, the defendant, knowing this, obtained from him the deeds in question—not that he merely accepted a good bargain on the spontaneous offer of Jones, or that he made a nude tender of bad terms to Jones, which he voluntarily adopted—were this all, I do not see that a court of law could interpose—but the defendant resorted to measures to overreach him ; and if the evidence warranted the jury in inferring that the course pursued by the defendant was in furtherance of a design or plan laid to circumvent Jones, then I think the acts done, combined with such impure intent, amount to evidence of fraud in fact, when practised towards one of Jones's mental and bodily state. The circumstances importing a formed design to overreach, are : the defendant's taking Jones to his own house, where the agreement was signed on the 10th of May, Jones being in bed at the time ; the fact that he was next day found there drunk ; that before he could have recovered from the effects of that intoxication, a receipt for fifty pounds, falsely said to be for all his lands in Upper Canada, and afterwards the deeds, were obtained ; that he subsequently shed tears of remorse, refused to accept the assignment of stock, and was the next day labouring under delirium tremens. The whole must be regarded as one continued transaction. The jury might well infer that the defendant invited Jones to his house, in order to impose upon him ; that he led him into drink, or at least indulged him in it, instead of keeping him sober ; that when Jones signed the agreement he was either under the undue influence of liquor, or not a free agent at liberty to exercise an unrestrained and sound discretion ; that the payment of 50*l.* to the Commercial Bank, if authorised by Jones, showed an eagerness in the defendant to obtain an actual claim against the estate ; and also, that if Jones's object was to visit Europe, for which he required the cash himself, his bargain was insensible, unless he exacted 100*l.* instead of 50*l.*, that is, enough to pay off the bank and reserve pocket money ; that the receipt and deeds of the 12th May were obtained while Jones was unrecovered from the previous

day's indulgence at the defendant's house ; and that they both falsely asserted the 50*l.* to be in full for the lands—a fact which plaintiff's agreement of the 10th, and defendant's of the 12th, disprove, and which the jury might fairly presume was either concealed from or designedly left uncommunicated to Jones, evincing a fraudulent suppression of the truth—a design to deceive. The agreement of the 10th May would be very proper in a fair transaction, but it evinces eagerness to fasten Jones with a bargain, for it was to be finally executed the next day but one. The receipt, if it spoke the truth, would have been in itself a proper document to have exacted, and it evinces Jones's assent to the payment, but it manifests also an anxiety to obtain a lien upon all his lands, and falsely describes the 50*l.* as received in full for the same. The deeds were proper in an unexceptionable purchaser, but they represent falsely the true consideration, and were exacted from Jones when in bed, ailing, and obviously to a great degree incompetent to the transaction of such business. The defendant may have acted innocently and *bona fide* throughout, or he may have acted otherwise. The jury have placed an unfavorable construction on his conduct, and I am not dissatisfied with the result. I think it quite as just to infer the *mala fides* of the defendant as the contrary. I make no comment on the defendant's application to Mr. Taylor for Robertson's note and of his haste to take possession, and so force Jones to become a plaintiff instead of a defendant in discussing the validity of the deeds ; but I do not overlook the inadequacy of consideration. The witnesses cannot agree in the value of Jones's estate, and we have no proof from competent testimony of the market value of the stock. I doubt not it is far less than that of the land. With respect to the stock, it is to be observed (independent of its value, and admitting the interest of the defendant's wife to the extent suggested), that it is alleged to be vested in trustees—no trust-deed being produced—that they may not be bound to notice, or may be prohibited from adopting the defendant's sale, either solely as a marital right or jointly with his wife—that she may not be bound on the

twofold ground of minority and coverture, and that even in equity the husband's assignment would not be enforced without previous provision or settlement in favour of the wife. As a matter of law, the presumption is, that the assignment could not be at all available to Jones—that it was worthless and useless.—5 Ves. jr. 515-6; 1 Anstr. 63; 2 Bro. C. C. 589; 2 Roll. Ab. 134; 2 Eq. Ca. Ab. 144; Comyn. 325; 2 Ves. jr. 676; 3 Ves. jr. 506; 1 P. Wms. 459, (n); 4 Ves. jr. 18, 515; 12 Ves. jr. 497; 16 Ves. jr. 413; 1 Atk. 458. But since the defendant may have been equally ignorant of the law, at least since he does not seem wilfully to have concealed or misrepresented anything on these heads, fraud is not imputed to him in these respects; still it may be observed that, like the horse-shoe-nails in the case 1 Leon. 3, the value at first sight to one of Jones's enfeebled intellects might appear, or be easily made to appear much greater, as in that case it appeared much less, than the truth would warrant. The amount of stock is large—the diminution of value, as to the defendant's interest, arises from contingencies, depending upon lives. Jones was incapable of appreciating their effect upon the present value of the fund, and must have been totally ignorant of the facilities or impediments of accomplishing in London a present sale of the remainder to Mrs. Capreol, and its immediate conversion into money was obviously contemplated by him in the circumstances in which he expected to be placed; but if all were valid in law, and its market value, computed on the principle of annuities and reversions, could be readily obtained in England, still it was inadequate; and incumbered as it is with difficulties, obvious to any one of intelligence, it is calculated to support the inference of unfair practice. Inadequacy of value is not in itself sufficient to invalidate a sale at law and not even in equity, unless grossly disproportioned, but it is a proper circumstance to be regarded both in law and equity when fraud is complained of.—1 Star. N. P. C. 51; 2 Taunt. 2; 2 Burr. 1082. Comparing all the circumstances, I cannot but believe that the defendant availed himself of the opportunity to impose upon Jones, so as to obtain deeds

of several lots of valuable land for a consideration comparatively almost nominal—that such a bargain could not have been made with him had he possessed his ordinary judgment—that the defendant knew of his weakness and resorted to practices in order to inveigle him into a bargain greatly detrimental to his interests, and that the jury were warranted in finding acts done and intentions prompting those acts, which (considering the object and the condition of Jones) amount to such fraud as in a court of law is sufficient to invalidate the deeds, in other words, that they are null and void in law and passed no estate—that no resort to equity is essential, in order to procure a recompense—that the estate was never divested out of Jones, and that consequently no future purchase under the defendant, however innocent, could acquire any title under the deeds of the 12th May. It is not necessary to decide whether the defendant can recover from Jones the money paid. I incline to think he may, but give no express opinion. Of course it is open to the defendant to take the sense of another jury upon the transaction, if he can alter the features of the case, or if he shall be so disposed even upon the present evidence.

Per Cur.—Rule discharged.

COOK v. JARVIS, ESQ., SHERIFF.

A Sheriff who has wrongfully seized property in execution cannot call in question the right of the party from whose possession the property was taken by him, as that it was received under an assignment, fraudulent as against creditors, from the execution debtor.

Trover brought against the defendant, sheriff of Gore, for seizing and selling two horses, the property of the plaintiff. At the trial before Mr. Justice Macaulay, it appeared that two writs of *fieri facias* against the goods of one Boyes had been delivered to the defendant on the 16th May, 1833, returnable the first of Trinity term following. Upon these writs the sheriff seized some goods of the defendant in his district, and besides these Boyes was possessed of the horses in question, which at that time and during the whole period until after the return of the execution were in the Home District. About the end of July, after the return of the execution, the deputy sheriff went into the Home Dis-

trict and seized these horses in a stable of the plaintiff on a Sunday, took them up to Hamilton, and sold them. The day after the writs came into the sheriff's hands Boyes, it appears, placed these horses in the hands of one Jacob Hutchinson, or rather he gave direction to the person who had charge of them that Hutchinson should be allowed to take them, and he gave Hutchinson a paper, in which he acknowledged that he "Received of Hutchinson 69*l.* for four horses and harness and a sleigh, in full of all demands for the same." The horses in question were two of the four mentioned in the receipt. Hutchinson proved that he had not in fact bought the horses as the writing imputed, but had received them from Boyes upon the trust that he would apply them to securing a debt of 18*l.*, due by him to one English and a further debt due to the plaintiff in this action, and he stated that he was authorised to sell them for paying these debts and others due by Boyes. The horses remained for a few days after the transaction with Hutchinson, in the charge of Boyes's hired man, and were used as before in a stage driven for hire between the City of Toronto and the Township of Toronto. About a week after the sale, Hutchinson transferred the horses, as he stated, to English in part payment of his debt, and English was to pay the plaintiff Cook a debt of 52*l.* 10*s.* due by Boyes on a note-of-hand. English on the 29th May transferred the horses to Cook in payment, as he stated, of Boyes's note to Cook, which he had assumed on getting the horses from Hutchinson; he received also some money from Cook in addition. Two papers were put in and proved, by one of which Hutchinson acknowledged to have received 69*l.* from English for the four horses, harness and sleigh, and by the other English acknowledged to have received the same sum from Cook, the present plaintiff, for the same horses, harness, and sleigh. English and Cook followed the horses to Toronto on or about the 29th May and took them from the stage in which Boyes's driver was using them—English delivered them over to Cook, and Cook took them to his own place in the Home District, where they remained until about the 28th July, when the seizure above-mentioned took place.

It was admitted that there were judgments against Boyes to support the writs of execution produced. The jury found for the plaintiff and 32*l.* damages.

In Easter term last the *Solicitor General* moved to set aside the verdict and for a new trial, on the ground that the transfer to Cook was fraudulent as against creditors, and that the plaintiff in the executions being creditor of Boyes, Cook could not sustain this action, having acquired no property in the horses, as regarded Boyes's creditor, through this fraudulent transfer. *Sullivan* shewed cause.

ROBINSON, C. J.—There are many strong indications of fraud in the case, so far at least as Boyes and Hutchinson are concerned. There is great reason to conclude that no change of property was intended to be effected by what took place between them on the 17th May. The transaction took place the very day after these two executions came to the sheriff, the horses were allowed to remain afterwards in possession of Boyes's driver, and were used in his service. The writing given by Boyes to Hutchinson bears date 1st March, 1833, though it was not in fact signed nor any such agreement or transfer made or thought of till the 17th May, and the anti-dating was sworn by Hutchinson to have been intentional on the part of Boyes, for some reason not explained to him—most probably under the impression that it was necessary to give to the transfer the appearance of having taken place before the execution issued. Then all the three papers evidencing the three transfers express the same consideration (69*l.*) to be paid by all, which does not tally with the facts stated. From all these circumstances I should infer that, as between Boyes and Hutchinson, it was a mere contrivance, to be prepared to set the sheriff at defiance if he should come to levy on the horses. I am inclined also to think that English knew well what was intended, and acted in the same spirit; whether Cook did not actually accept them from English *bona fide* in payment of Boyes's note for 52*l.* 10*s.*, which he seems to have given up, and whether he was not innocent of participation in a scheme to defeat Boyes's creditors, by a mere pretended sale, is more doubtful on the evidence; there is perhaps

some ground for suspicion as it regards him, but nothing strong.

The question is—as the sheriff had no right to seize property out of his district, and therefore was a mere wrongdoer, can he call in question the right of Cook to the horses which he took out of his possession, and can he object that the transfer to Hutchinson was void as a fraud on creditors, when it was clearly binding on Boyes himself, and when he (the sheriff) was not legally enforcing the law in favor of any creditor of Boyes, and so has no pretence for sheltering himself by setting up their rights in opposition to Boyes's acts. It being admitted that there were judgments to support the writs of execution produced, it is established that Boyes was a person indebted at the time of his transfer, or pretended transfer to Hutchinson, and therefore if the evidence was such as to satisfy the jury that that transfer was merely colorable, they were warranted in inferring that it was made fraudulently for the purpose of defeating creditors, in which case it would be under the provisions of 13 Eliz. ch. 5, "clearly and utterly void, frustrate and of none effect," but "against *that person only* whose *action, suit, debt, account, &c.* might by such fraudulent devise be in anywise disturbed, hindered, delayed or defrauded," &c.

In another case, formerly before this court, which turned upon the construction of the statute, there was a difference of opinion upon the point, whether under it, in an action against the sheriff, a conveyance of goods made fraudulently to defeat creditors, could be excepted to by the defendant as void, without his shewing a debt due to the person on whose behalf he was enforcing the process of the court. It was my opinion that the sheriff could, in an action of trespass or trover, defend himself by shewing that the pretended assignment was merely colorable, being made fraudulent to deceive a creditor or creditors; and that when he had shewn that the assignment must be held to be void, not merely against those whom the sheriff could shew to be creditors, but against any person whose suit or action would be hindered or defeated by such assignment, and consequently that the sheriff who had seized goods under an

attachment, need not in such a case shew that there was a debt actually due to support the attachment.

In this case, however, the sheriff shews nothing which can warrant us in looking upon him as acting in the execution of a legal duty, or as meddling with this property in any other manner than a mere stranger. He had, to be sure, two writs of execution in his hands against Boyes, but those writs were not in force when he sent his deputy into the Home District, and took the horses from thence out of the possession of this plaintiff. When therefore he had gotten them by this illegal and irregular act into his own district, he had no authority to seize them—if he could otherwise have taken advantage of their being placed within his power by his own wrongful act. Of course, if these horses had been legally seized before the return of the execution, they could have been sold after the return; because an execution once begun may be proceeded in—it is all regarded as one act. But here the sheriff ventured to act out of his district under color of process, which at the same time gave him no authority to do the same act even within his district—so that his act was utterly void, and he stands wholly unprotected by his official character, and in no other light than a mere trespasser. The plaintiff here has not brought trespass, but trover. Now if the defendant had in fact become possessed of these horses by finding or in any other manner, wholly unconnected with his office of sheriff, and had wrongfully converted them, it cannot be doubted on any ground that Boyes, the defendant in the writs of execution (if he had continued the owner of these horses, and had never pretended to assign them), might have brought trover against the sheriff, and recovered the verdict. It could have been no defence that there was once a writ in force under which the sheriff could have seized the horses, if they had been within his proper district. Now if Boyes could in such a case have recovered, Cook must be allowed to recover under the facts proved, for there is no proof of a fraud upon Boyes in divesting him of these horses, but there is proof, whether conclusive or not, of a fraud intended by Boyes in giving Hutchin-

son a paper, intended to hold him out as the purchaser of these horses, when it seems to have been otherwise understood between them; and so far as Boyes's evidence can be received, it seems certainly to have been no sale. Against Boyes however, and so far as his rights and interests alone are concerned, his own act is to be treated as valid and binding, and Cook's right to recover is not to be defeated from any respect to a supposed property in these horses remaining in Boyes. Nor, indeed, would that be just, for by giving Hutchinson the writing which he did, Boyes enabled him to deal with those horses as his own, and though English, to whom he put them off, may have been, I dare say was, as fully aware of Boyes's object and desire as Hutchinson was, yet there is no sufficient proof that Cook knew, or had reason to know, that there was anything else intended than what was possessed. He seems to have accepted the horses absolutely; to have paid 52*l.*, if nothing more, for them; and to have acted afterwards openly and unequivocally as their owner, by taking them into possession. If after this he can be made to lose the horses, it could only be upon proof that before Boyes alienated them, they had been bound by an execution delivered to the sheriff, or upon proof that Boyes did never in fact alienate them, and so continues to be the owner, and the only person entitled to recover recompense for the illegal conversion of them. But, as far as we can see from the evidence, no execution can ever have been attached upon them to this time; and as between Boyes and Cook, it would neither be right nor just to regard Boyes as the owner, and upon that ground to defeat Cook's recovery, in order that damages might in another action pass into Boyes's pocket, when Boyes has in fact deliberately, and by an act under his hand, declared that he had made Hutchenson the owner, through whom Cook claims, and claims, as far as we can see, not otherwise than honestly. I am of opinion that the verdict should stand.

SHERWOOD & MACAULAY, J. J., concurred.

Per Cur.—Rule discharged.

COMER v. THOMPSON.

A member of a joint stock company, not incorporated, lending with the assent of the company a sum of money out of the joint fund to another member, and taking from him a promissory note payable to himself individually, for repayment, can recover on the note, notwithstanding that the funds were advanced from the common stock.

The plaintiff and defendant in this cause were members of an association of persons, shareholders in the Farmers' Warehouse, in the city of Toronto, but not incorporated. The plaintiff was treasurer of the company, and by their desire, lent to defendant 40*l.* out of their joint fund, for which sum the defendant gave his note to the plaintiff in his individual capacity. Upon this note the present action was brought. *Bidwell* at the trial moved for a nonsuit, objecting that the consideration of the note thus appearing to be money in which plaintiff and defendant had a joint interest, as they would also have in the money to be recovered in this action, the plaintiff cannot sue his co-partner. The jury found for the plaintiff, and the point being reserved, *Bidwell* moved to set aside the verdict, and enter a nonsuit last term.

ROBINSON, C. J.—I think, 1st. There is a sufficient consideration to support the note moving from plaintiff to defendant.

2nd. Courts of law recognize trusts, and enquire who is beneficially interested—not to turn parties round when all is fair, but to prevent parties being turned round by those only nominally and not really interested.

3rd. Allowing the plaintiff to recover is only carrying the express agreement of the parties into effect.

4th. It is a collateral transaction; the effect is merely to place the money where it was before the defendant borrowed it for his own accommodation.

5th. If plaintiff had lent it without the assent of the company, clearly the defendant would have been liable. His assent is given that plaintiff may lend in the same manner as he would lend his own money, taking security to himself for repayment.

An agent lending his principals money, with his principals' assent, and taking a note in his own name, may surely sue on the note. This is in effect the same.

SHERWOOD, J. and MACAULAY, J. of the same opinion.

Per Cur.—Rule discharged.

ROWAND V. TYLER.

In an action of breach of covenant to make a lease of premises it is no ground for arresting the judgment that the premises are not particularly set forth, if the breach be as definitive as the terms of the covenant require; and where there are several issues raised, and the plaintiff has a verdict upon the whole record, it forms no good objection to his recovery, that some of the issues should have been found for the defendant, if there be sufficient without them to support the verdict, and they are not material.

Covenant brought upon a special agreement as follows :
“Articles of agreement made and entered into this ——
November 1829, between William Tyler, of, &c., of the one part, and Charles L. Rowand, of, &c., of the other part, witnesseth, that the said William Tyler, for himself, his heirs, executors and assigns, doth and hereby does agree to and with the said Charles L. Rowand, his heirs and assigns, to demise, grant, and to farm let, by a good and sufficient lease, for the term of ninety-nine years, to be given on or before the 1st January 1831, for and in consideration of the sum of 5s. to him now in hand paid by the said Charles L. Rowand, and for and in consideration of the hereinafter mentioned payments, all and singular the water privileges, together with what lands may be necessary for the privilege of building a grist mill capable of propelling two run of stones, with other water privileges, and all necessary conveniences thereunto appertaining and in anywise belonging ; and also to build an embankment or dam for the use of said water privileges, so that the water shall have 23 feet head and fall ; and further, to suffer and permit the said Charles L. Rowand, or his heirs and assigns, and all and every person under his and their employ, to dig and carry away earth from the bank and sides of the hills most convenient to the dam, for the purpose of building the said dam, and repairing and making the head and tail race to and from the said mill or water works, which

said land and water privileges is part of lot number eighty, on the west side of Yonge-street, and lying and being in the first concession of the township of King, aforesaid. And the said Charles L. Rowand, for himself and his heirs, doth, and hereby does agree to and with the said William Tyler and his heirs, executors and assigns, to build or cause to be built on the said lot No. 80, a good and sufficient mill and dam as aforesaid, in two years, from and after the 1st day of January next succeeding the date of this article : and further, to pay, or cause to be paid, to the said William Tyler, his heirs, executors, administrators or assigns, the sum of 10s. lawful money, &c., for each and every acre, per year, of land, which may be overflown or otherwise used for the purpose of raising the water 23 feet as aforesaid, or otherwise used in and for building the said mill and other water privileges as aforesaid. And the said William Tyler, for himself, his heirs, executors and assigns, hereby doth further promise and agree to and with the said Charles Rowand, to permit and suffer the said Charles Rowand to enter into and carry on such business, for the purpose of making preparations for the building of the said mill and dam, immediately after the signing and sealing of this article of agreement : and further, he the said Charles L. Rowand, for himself and his heirs, executors and assigns, doth and hereby does promise and agree to give unto the said William Tyler, his heirs, executors and administrators, a bond, subject to the penalty of 2,000*l.* lawful money as aforesaid, with approved security, to build the said mill, or cause the same to be built, in the time hereinafter mentioned ; when the said lease is given for the true performance of this article of agreement, the parties to this article of agreement hereby interchangeably become bound each to the other in the penal sum of 2,000*l.* of lawful money," &c.

The declaration contained one count, in which the plaintiff, with a *profert in curiam*, set forth the agreement correctly in substance—and averred, " that although at the time of the sealing and delivery of the articles of agreement, to wit, on the 1st November, &c., plaintiff paid to defendant the said sum of 5*s.* ; and although the defendant, in part

performance of the said agreement, to wit, on, &c., did permit and suffer the plaintiff, and divers persons in his service and employment, to dig and carry away earth from the banks and sides of the hills most convenient to the dam, for the purpose of building the same, &c., and did then and there in further performance, &c. permit and suffer the plaintiff to enter into and carry on preparations for the building of the said dam and mill; and although plaintiff, in pursuance of the said covenant, to wit, on the said 1st November and afterwards, within two years from the 1st January after the making of the said agreement, did build and cause to be built upon the said lot 80, a good and sufficient mill and dam, which said mill was and is capable of containing and propelling two run of mill stones; and although plaintiff hath always, from the time of building the said mill and dam, been ready and willing to pay to the defendant the said yearly sum of 10s. for each and every acre of the said ground so overflowed by reason of the said mill-dam and embankment, and otherwise occupied and used in and for building the said mill and dam; and although the plaintiff, after the making of the said agreement, to wit, on said 1st November, &c. did give to the said defendant a bond or writing obligatory in the penal sum of 2,000*l.*, with good security, which the said defendant then and there accepted and approved, which said bond was subject to a condition thereunder written, that the same should be void on the building the said mill and mill-dam within the term of two years from the said 1st January, according to the terms of the said agreement; nevertheless, the plaintiff saith that the defendant, although specially thereto requested by plaintiff, to wit, on the 1st January 1831, did not, nor would then or at any time since, demise, grant, or to farm let, by a good and sufficient lease for the said term of 99 years, from the said 1st January 1831, nor by any lease, nor for term or terms whatsoever, unto the said plaintiff or his assigns, the said water privilege, nor the said lands necessary, and which were used by the plaintiff, for the purpose of building the mill and embankment or dam, nor any part thereof, but wholly neglected

and refused so to do : whereupon plaintiff saith defendant hath not kept his covenant, but hath broken the same, to plaintiff's damage," &c.

The defendant pleaded—1st. *Non est factum*. 2nd. *Actio non*, "because defendant did, on 1st January 1831, tender to plaintiff a lease for 99 years of the said water privileges and lands, according to the agreement, but plaintiff refused to accept the same. 3rd. That defendant has always been ready, but plaintiff never requested him to make a lease. 4th. That defendant has always been ready to make a lease, as in the agreement mentioned, but that plaintiff did not nor would erect on lot 80 a good mill and dam, according to the agreement. 5th. That defendant has always been ready, on performance by plaintiff of the covenants to be first performed on the part of plaintiff, to demise, &c., yet plaintiff hath not erected, &c. a good and sufficient mill, &c. so that the said water privileges on the said lot 80 should have 23 feet head and fall. 6th. That although defendant hath always kept his covenants, &c., plaintiff hath not erected a good and sufficient mill, &c., nor an embankment for the use of the said water privilege on the said lot No. 80, so that the said water privileges on the said lot should have 23 feet head and fall. 7th. That although defendant hath kept all his covenants, &c., and although defendant offered possession and full power, authority and license to plaintiff to enter upon lot 80, &c., to wit, on 1st November 1829, for the purpose of erecting the said mill and conveniences, and for erecting the said embankment; and although defendant, on 1st November 1829, pointed out, designated and described the portion and part of the said lot No. 1 in the first concession of King aforesaid, whereon the said mill and embankment should and might be erected, so that the water privileges should have 23 feet head and fall; and although defendant offered possession to plaintiff of the said portions of the said lot so pointed out, &c.; and although defendant offered plaintiff to perform all and singular the covenants on his part to be performed, according to the intent of the said agreement, yet plaintiff refused to accept and receive possession of the

said portion of the said lot so pointed out by the said defendant, and still refuses, &c. contrary to the covenant," &c.

Plaintiff took issue on the first and second pleas. To the third he replied, "that after the building of the said mill and embankment, according to the agreement, &c., to wit, 1st January 1831, plaintiff demanded of defendant a lease for 99 years of the said water privileges, and what lands might be and were necessary to be used for the building the said mill, embankment, &c., so that the water should have 23 feet head and fall, the same being upon and part of the said lot, No. 80, subject to the yearly rent in the said agreement mentioned, according to the intent, &c. of the said articles. To 4th plea—that he did erect and build on lot 80 a good and sufficient mill, &c., and an embankment or dam for the use, &c., so that the said water had and has 23 feet head and fall, &c. To 5th plea—that he did erect, &c. on lot 80, a good and sufficient mill, and an embankment, &c., so that the said water had and has 23 feet head and fall, to wit, 1st January 1831, according to, &c. To 6th plea—that he did erect, &c. on the said lot No. 80, a good and sufficient mill, &c., and an embankment or dam, &c., so that the said water had and has 23 feet head and fall, to wit, on 1st January 1831, according to the true intent, &c. of the said agreement. To 7th plea—that plaintiff did, by license, &c. of defendant, enter on said lot 80, and did erect the said mill and embankment upon a certain part and parts of said lot 80, for that purpose pointed out by defendant, according to the true intent, &c. of the said agreement."

The defendant joined issue upon all these replications.

At the trial of the cause in April last, a general verdict was found for the plaintiff, with 1800*l.* damages, and last term the *Solicitor General*, for the defendant, moved to set aside this verdict as contrary to law and evidence, or to arrest the judgment. The agreement declared on was not produced at the trial; it had been brought into court on a former trial of this cause, and proved, when a verdict was rendered for plaintiff, on the issue of *non est factum*; but upon account of the pleas of release, the verdict given on

that trial was set aside, and a new trial granted, after which the plea of release was set aside, and the parties allowed to replead. Upon the argument of the motions made against the last verdict, and subsequently against the plea of release, the agreement was in court, but afterwards was, by some accident, mislaid, whether in the Crown office or otherwise is not known. At the last trial, the defendant's counsel admitted the loss of the agreement since the former trial, and admitted also the execution of the agreement; whereupon the plaintiff proceeded to shew the contents, by proving that the Nisi Prius record before the court contained the oyer of the agreement, on which the parties were at issue on the plea of *non est factum* at the former trial, when no variance was objected, and plaintiff recovered. That oyer was also sworn to be correct, and a copy of the oyer delivered to the defendant's attorney was also put in and proved. On this evidence the defendant's counsel objected that the proof of the contents of the agreement was insufficient—excepting to the sufficiency of the secondary evidence; and now, in term, the objection was renewed, on a ground not announced at the trial—namely, that no secondary evidence could be legally received, the plaintiff having pleaded the agreement with a *profert in curiam*, and that in such a case, and so long as the record stands in that form, nothing can dispense with the production of the original; and that when in fact the instrument has been lost since it was declared upon, the plaintiff must obtain leave to amend his declaration, alleging the loss of the instrument, or stating such facts as may dispense with the *profert*.

Sullivan, for plaintiff, met this objection, by contending that the admission at the trial of the execution of the instrument, admitted its existence, and rendered its production unnecessary, and that the evidence of the copy was complete and satisfactory; that in a case like this, when the deed has been produced and proved in court, the plaintiff has done all that he can do, it remains in the custody of the court; that the cases cited are when the instrument was lost between declaration and trial, before it had been actually given in evidence and taken into the keeping of

the court, and while it continued under the control of the party ; that the defendant did not at the trial except on this ground, but merely to the sufficiency of the secondary evidence, with the impossibility of receiving any secondary evidence ; that he should not now be allowed to make a new exception, not specifically urged at the trial, after having argued the case before the jury on the merits, and reasoned upon the conditions and effect of the agreement, the execution of which he had moreover admitted.

At the trial, the defendant further objected :—1st. That the declaration expanded the meaning of the agreement beyond its legal import, for there is nothing in the defendant's covenant binding him to give a lease of the premises claimed ; that the breach is in this respect bad, being too comprehensive. 2nd. That the issue on the third plea was not supported in plaintiff's favour, for that he should have tendered a written lease to be executed by defendant. 3rd. That no sufficient demand of a lease was made by plaintiff ; for that it was proved only that one Hollinshead demanded a lease to himself, as assignee of plaintiff, whereas defendant was not bound to make a lease to the assignee of plaintiff. The judge, noting these exceptions, allowed the trial to proceed. It appeared in evidence, that a mill with two run of stones had been built on lot 80, partly by plaintiff, but in greater part by one Hollinshead, to whom plaintiff, during the progress of the work, assigned his interest in the agreement ; that the mill was finished within the period limited, and cost 1800*l.* or more. It was denied, on the part of the defendant, that the mill was built on the site intended by the agreement, and much of the evidence related to that point. As there was some contradiction in this testimony, the learned judge desired the jury to find expressly by their verdict, whether the mill was or was not built upon its present site with the assent of the defendant. The jury found that it was ; and though the evidence was conflicting, it fully warranted that opinion. The agreement specified no precise spot upon lot 80, where the mill or dam should be placed ; and it was explained by a witness, who framed the agreement, that, until the mill could be built, it

could not be precisely ascertained, so as to admit of an accurate description by metes and bounds ; and as the mill was to be immediately commenced, it was not thought material to attempt a specific description beforehand. The mill was proved to answer the particulars stipulated for in the agreement ; but the defendant, besides objecting that it was placed on a wrong part of the lot, complained also that the 23 feet head and fall are no otherwise obtained than by flooding a part of an adjoining lot, belonging to one Kennedy (about 10 acres), which placed him at the mercy of Kennedy, or rather of Hollinshead, who was really the plaintiff in this suit ; for it was proved that Hollinshead had obtained from Kennedy the control over the land thus illegally overflowed. Upon this latter point there seemed to be no doubt ; the evidence to that effect is not contradicted.

After the mill was completed, Hollinshead, in plaintiff's presence, and having a power of attorney from him, demanded a lease from defendant, not tendering any written lease for execution ; but defendant refused, saying he had before offered plaintiff a lease of the land he was willing to demise. This lease plaintiff had declined accepting, because it was for land on a part of lot 80, altogether different from that on which the mill was built. Defendant declared he would give no other.

Upon this evidence, the *Solicitor General* urged—that the agreement imports that the lease was to have been made before the mill was begun, and that a definite extent of land should have been ascertained and specifically described, and a lease demanded for that and no other ; that the mill-dam flows back water upon a third party, and consequently defendant does not get such a mill built upon his premises as he contemplated—but, on the contrary, the mill could not be used without incurring the risk of law-suits for the injury done by the back-water ; that by the agreement plaintiff was bound to pay a rent of 10s. per acre for the land that was to be included in the lease, and therefore it was necessary to ascertain precisely what land the lease should contain, for which land, and no other, a lease should have been demanded.

He further moved in arrest of judgment:—1. That the bond which the defendant avers he tendered, is not such a one as the agreement contemplated, and therefore that condition precedent is not complied with. 2. That the declaration is insufficient, in not averring that the mill was built on a place designated by defendant; or that it was built on a part of lot 80, where there was 23 feet head and fall of water. 3. That the agreement contains nothing to shew what particular land plaintiff was entitled to a lease of, and therefore the declaration cannot shew that the land of which he requested a lease, was not more than he was entitled to. 4. That the declaration does not aver in particular what land was occupied under the agreement, nor that it was part of lot No. 80. He also contended that the verdict should be set aside on the ground of excessive damages, since the placing the mill so that the 23 feet head and fall could not be obtained without trespassing on a third party, renders the mill in a manner useless, and diminishes, if it does not nearly destroy, the benefit which the defendant had in view in making the agreement, which was to ensure there being a good and sufficient mill in operation on his property; and that the jury should have considered this, and not allowed in damages the full cost of the mill.

ROBINSON, C. J.—This action is of considerable importance, from the amount involved. The defendant has so strenuously resisted it, that it is probable he imagines he has been in some respects unfairly dealt by; and it is probable that the plaintiff in some particulars may have proceeded in a different spirit from that which the defendant had a right to expect. But judging, as we must, from the evidence which the jury had before them, we must admit that the justice of the case is strongly with the plaintiff, or rather with Hollinshead, his assignee, who sues in his name. Not looking for the moment to the legal questions raised, the agreement, as we see, designates no particular site for the mill, and binds the plaintiff to select no one part of No. 80, more than another; nor does it provide that the defendant shall select the site. The evidence was such as to

satisfy the jury that the plaintiff or his assignee did erect the mill within the period prescribed by the agreement, and upon the site which the parties did in fact contemplate; that the defendant saw the mill while it was being built at a great expense, and did not forbid it; some witnesses state facts which would shew that if he did at one time entertain an objection to the site chosen, he afterwards waived that objection; according to other witnesses, he did not at any time approve of or acquiesce in the site, but stated that the right of selection was with him, and that he preferred another. The spot, however, of which he wished to give a lease (after the mill had been completed on another part of the lot, at an expense of 1800*l.*), seems to have been one that could never have been intended; and the defendant's insisting upon it, strengthened the case against him, as it leads to the opinion that his dissatisfaction is rather with the agreement itself, into which he had entered, than with anything that was in fact done under it. The only point that seems to make (so far as I can see) against the justice of the case, on the part of the plaintiff, is the placing the mill so that the 23 feet head and fall are not obtained without trespassing upon the adjoining land of a stranger, by reason whereof the mill cannot be used without subjecting the party using it to damages. But, on the other hand, it is to be considered, that the defendant stipulated in positive terms that a mill should be built which should have 23 feet head and fall of water; that he was as much bound as plaintiff was to shew whether that could be done or not, without throwing the water back on the next lot, and is as much bound in justice to abide by the consequence of the experiment or attempt—there being no reason why all the loss, consequent upon a failure, should fall upon plaintiff more than upon defendant; besides, the possession and the whole profits and use of the mill were to be with plaintiff and his assigns, for 99 years; and if defendant had made them a lease, as he covenanted he would do, the loss would have been plaintiff's, and not defendant's, if he had been unable to use the mill without overflowing his neighbour's land. But, according to the evidence, Hollinshead has ac-

quired from Kennedy the right over the land overflowed, so that it seems if he had received the lease, he had guarded himself against the obstacle to the enjoyment of it. It is certainly to be said, that defendant, his heirs or assigns, would find the reversion, after the 99 years, of no benefit, as the proprietor of Kennedy's lot would have it in his power to harass them with actions, and that if the mill could not in the meantime be used, defendant would suffer a loss, and not plaintiff alone; since it is to be presumed that the advantage of having a mill in active operation on his farm, must have been defendant's chief inducement for granting the privilege to use the water and occupy the land at so trifling a rent. But, as to the first of these grounds, the consideration of interest is too remote to make it a justifiable ground for withholding the lease after so great an expense had been incurred; there could be no proportion between the certain and immediate loss to plaintiff on the one hand, and the probable loss to defendant on the other, of the use of a wooden grist mill 99 years hence. As to the second ground, we are not justified in assuming that if the lease had been made the mill could not have been used; on the contrary, Hollinshead seems to have prepared himself against that difficulty by bargaining with Kennedy, and at any rate Kennedy might not have been found unreasonable, nor could have absolutely prevented the mill from being used; he could only have claimed his damages from time to time, for the overflowing of his land. Defendant, it is true, may now meet with difficulty in using the mill, because Hollinshead has acquired an interest in the land overflowed, and may be hostile and troublesome, instead of being accommodating; that, however, would be an injury which the defendant would have brought upon himself by endeavouring, contrary to good faith, to keep the mill, instead of making a lease to plaintiff or his assigns. In my opinion, it would not be justice between these parties, looking at the terms of the agreement, and at what the one has done and offered to do with the knowledge of the other, that defendant should on this account be borne out in taking the remedy into his own hands, by absolutely refusing to make the lease.

What I have hitherto said has reference only to the justice of the case, which it is frequently material to consider in a court of law, because we may be and ought to be much influenced by it when we have any discretion to exercise on yielding or refusing to yield to technical objections, as we sometimes have, from the tenor and manner in which such objections are urged. And I repeat, that, from the evidence, it seems to me that the substantial justice of the case is with the plaintiff, or rather with his assignee, Hollinshead, who is suing in his name. I will now proceed to consider the legal objections; and first, those which are moved in arrest of judgment.

I do not see on what ground it has been contended that the declaration avers the tender of a bond different in its terms from such as the plaintiff was bound to furnish before he was entitled to a lease. The covenant is, that Rowand shall give to Tyler, "his heirs, executors and administrators, a bond, subject to the penalty of 2,000*l.*, with approved security, to build the said mill, or cause the same to be built, in the time hereinbefore mentioned, when the said lease is given." The declaration avers, that after the making of the said agreement, to wit, on the 1st November, the plaintiff did give to the defendant a bond or writing obligatory, in the penal sum of 2,000*l.*, with good security, which the said defendant then and there accepted and approved, which said bond was subject to a condition thereunder written, that the same should be void on the building of the said mill and mill-dam within the term of two years from the 1st of January next, after the making of the said agreement, according to the terms of the said agreement. I can see no substantial variance here, nor indeed any variance; and, moreover, the defendant has pleaded over, resting on other defences, and has not denied, but admitted that a bond was given according to the terms of the agreement.

The next objection taken to the declaration is, that it is not averred that the mill was built on a place designated by the defendant, or that it was built on a part of lot No. 80, where there was 23 feet head and fall of water. But the agreement contains covenants, on the part of plaintiff

and defendant, that are completely independent. The building of the mill is not to precede the execution of the leases; on the contrary, defendant is absolutely and unconditionally bound to make a lease on or before the 1st January, 1831, but plaintiff is only bound to have the mill completed by 1st January, 1832, and he is to give a bond that he will build it before he can demand a lease. It can be no objection, therefore, that the declaration does not state that the plaintiff had built the mill on any particular site or in any particular manner, when he was not bound to build it at all before he obtained his lease. Besides, I see nothing to countenance the idea that the defendant was to select the site. The agreement does not say so, and that is not the reasonable inference from anything contained in it.

The next ground on which the defendant moves to arrest the judgment is, that the agreement contains nothing to shew what particular land the plaintiff is to have a lease of, and it does not therefore appear that the land of which he did request a lease was not more than he was entitled to. In form the objection is correct, no land was specifically described, of which the plaintiff was entitled to demand a lease, but the breach is in terms as definite as the agreement requires, and that is sufficient. If indeed there is in the agreement a fatal vagueness and uncertainty in this respect, so that it is not capable of being ascertained what the plaintiff has a right to demand under it, then an objection on that ground would be valid; but we must give a reasonable construction to agreements, looking at the language and the apparent intent of the parties, and considering at the same time the nature of the subject matter, in order that we may discern the intention. This agreement is evidently not drawn by a lawyer, but it is not obscurely expressed, and I do not find any repugnance in it, or any difficulty in discovering what is meant by it. I place this construction on it: The defendant owned a farm, on which there was a stream of water, which it was supposed would afford a mill-site: the plaintiff agreed with him for permission to occupy and use this water-privilege (as it is called), and he stipulated that he might be allowed so to manage

it as that he might obtain 22 feet head and fall of water, overflowing as much of defendant's lot as might be necessary for obtaining that head, occupying as much land as he might require for the mill and appurtenances and the dam, and paying at the rate of 10s. per acre annually for all the land of which the defendant might be thus deprived. I consider the 23 feet head and fall a stipulation insisted on the part of the plaintiff, to entitle him to make use of the stream or power to that extent, and consequently to occupy all the land necessary for that purpose; and I consider also, that the plaintiff, keeping within that limit, as to height of water, was at liberty, under the agreement, to place the mill on such part of lot No. 80 as he might find best suited to that purpose. Further, I think it is evident that both parties intended and understood that plaintiff might and probably would go to work immediately under the agreement, and lay out and build the mill and form his dam, &c. though he was not bound to complete it before January 1832. It would naturally occur to them that if, as was probable, the work should be so far advanced before January 1831 (the time the lease was to be made), as that the ground to be occupied would be apparent and ascertained, there could then be no difficulty in giving a specific description in the lease. If the work should not be so far advanced then, either resort might be had to persons skilled in such matters to make the survey and take levels, and thus to mark out the ground required for the mill, dam, &c. which no doubt it was very possible to do; or a lease might be demanded in the very words of the covenant for "all and singular the water-privileges, together with what land may be necessary for the purpose of building the mill," &c. I am of opinion that if plaintiff had done nothing to fix the site before January 1831, he might nevertheless have demanded a lease in the terms of the agreement, and a lease in those terms would give him the estate intended in the lands, which upon evidence should be shewn to be necessary for the purposes contemplated.—Co. Lit. 6 A. The fact was, that the plaintiff did actually complete the mill before the 1st January, 1831, so that the ground taken and to be occu-

pied was ascertained, and the case being so, the plaintiff has averred it, and consequently has set out something certain to refer to, if that were necessary, for when he says he has built the mill, made the dam, &c. pursuant to the agreement, and required a lease of the grounds necessary, and which was used by him for the purpose, &c. he refers to an existing quantity of land, capable at any time of measurement, though it may not have been actually measured; and besides, for all that appears, he may have had it measured, and may have demanded a specific quantity of land—he does not say otherwise—his averment is not inconsistent with that supposition, and I think it does sufficiently appear in the declaration, at all events, that the plaintiff did not demand a lease of more land than he was entitled to.

As to the fourth ground moved in arrest of judgment—namely, that the plaintiff does not aver what land was occupied by plaintiff under the agreement, nor that it was part of lot 80—it seems to be involved in the preceding exception. The plaintiff has stated that in pursuance of the agreement he built a mill on lot No. 80, and that he demanded a lease of the water privilege and the land necessary and used by him; and in my opinion it sufficiently appears in the count, and must be intended from what is stated, especially after verdict, that the ground occupied was part of lot 80, and that of such ground and no other the lease was demanded; the third plea, and the issue raised upon it, seem to remove any ground for an objection of this kind.

We must next look at the several issues to be tried, and see whether upon any of them the defendant was entitled to have succeeded upon the evidence. The plaintiff has taken issue upon all the defendant's pleas. Clearly on the issues raised on the second, third, and fourth pleas, the plaintiff was entitled to succeed, on the evidence given at the trial, and indeed the fourth plea raises an immaterial issue on which the defendant could not receive judgment in his favour; and the same may be said of the fifth plea, and also of the sixth and seventh; so that it is of no consequence to discuss particularly who ought to have had the

verdict on those issues. There is no condition precedent to the giving of the lease, unless perhaps it be the giving of the bond mentioned. If it were necessary to apply the evidence to these issues, I am not prepared to say that all were not proved in the plaintiff's favour. Those upon the fifth and sixth pleas turn upon the fact that the 23 feet head was not obtained without flowing back water on the adjoining lot. The plaintiff states, in his replications, that he did erect on lot 80 a good mill, so that the said water has 23 feet head and fall, according to the true intent of the agreement, and I think that was substantially proved. The inconvenience of trespassing on a neighbour would fall rather on plaintiff than on defendant, if the lease had been given. Defendant agreed that the water should be raised to 23 feet head and fall on lot 80, and it has been; the consequences are as much to be ascribed to him as to plaintiff, for they both joined in the agreement; but, at any rate, it is certainly to no purpose to discuss this—for first, the building the mill was not a condition precedent; and second, it cannot be maintained, on any principle, that the circumstance of 23 feet head being raised on No. 80, having the effect of overflowing the next lot, can bar the plaintiff of his right to demand a lease, and entitle the defendant to retain the mill. As to the issue on the seventh plea, it is an immaterial issue, for the agreement does not restrict the plaintiff to the building a mill only upon such site as the defendant should designate; but if the issue were material, there is enough upon the whole evidence to warrant the jury in finding for the plaintiff upon it, since there is proof that defendant suffered the mill to be built, where it was, sometimes objecting, at other times assenting impliedly, by speaking approvingly of the mill, or by only objecting on other grounds.

Some exceptions were urged at the trial, and others in banc, which I have not yet spoken of—but they are more or less involved in the grounds taken in arrest of judgment. The first objection taken at the trial—that the declaration expanded the agreement beyond its true meaning—has been already disposed of. The second objection applies to the issue upon the third plea, upon which it is said the defen-

dant ought to have succeeded, because the plaintiff did not prove that a written lease was tendered for execution, but the agreement does not require that the plaintiff should prepare or tender the lease—the defendant binds himself to demise, let, &c. by a good and sufficient deed; and, besides, the defendant refused altogether to comply upon terms which dispensed with the tendering of any lease. He declared he never would make a lease of the premises claimed. The plaintiff was, I think, under no necessity of averring that he tendered a lease to be executed, and in his pleading he has not done so. He states only that he requested the defendant to demise, &c. according to the agreement. The necessity, therefore, of proving a lease tendered for execution was not imposed either by the agreement or the plaintiff's pleading. Whether the objection was made at the trial, under the idea that it extended to bar the plaintiff's right to recover, I am not aware, but at all events it cannot, I think, be supported.

The third objection taken at the trial was, that a lease was never legally demanded, for that the defendant was required to lease to Hollinshead as assignee, and not to plaintiff, to whom alone he was bound to demise. If this objection were well founded in point of legal effect, the facts do not support it, for one of the witnesses proved that, according to his recollection, Hollinshead exhibited a power of attorney from Rowand (the plaintiff) and demanded of defendant to give him a lease in plaintiff's name. The refusal of defendant however was placed on other grounds. He would make a lease to no one of the lands required. The refusal extended to plaintiff as well as Hollinshead. The objections to the evidence moved in term were none of them distinct from those moved at the trial or in arrest of judgment, but were all of them included in one or the other.

It remains to be determined whether the verdict should be set aside for excessive damages or for the non-production of the original agreement at the trial. The damages given by the jury seem to have been intended to give to the plaintiff or his assignee a mere recompence for the money and

labour expended in building the mill, of which the defendant persists in retaining possession, and I can see no just ground for not granting the indemnity to the full extent. Defendant saw the mill built—did not forbid it—and, for aught that I can see, should have made the lease required. The pretence that the dam backed water upon Kennedy's land is not, I think, entitled to consideration, because if that had been found to create an obstacle to the enjoyment of the mill, it could have been but a partial obstacle, not a decisive impediment; the loss too would have been mainly the loss of Hollinshead, not of defendant; and, lastly, Hollinshead, as it appears, had provided against it by compromising with Kennedy, so that upon the evidence, the jury I think, would not have acted discreetly if they had deducted anything from the damages to be given upon that ground. As to the non-production of the original agreement—we cannot but feel that an objection upon that ground ought not to be given way to, unless upon principle and authority, it is so clearly fatal, that even under the circumstances of the case we have no discretion. It is certainly broadly laid down in the books that where a plaintiff declares upon a deed with a *profert in curiam*, nothing can dispense with its production. The cases in the margin fully support the principle.—4 Ea. 585; 2 Campb. 557; 1 Stark, N. P. C. 74. It is to be observed, that in two of these cases the plaintiff declared with a *profert in curiam*, when, at the time of declaring, the deed was not in his possession or in his power; but in this case the plaintiff declared rightly with a *profert in curiam*, for he did bring the deed into court on the first trial, and placed it in the custody of the court, where it must be presumed to be still, for all that is shewn is that it has not been found. We had it judicially before us upon the former trial of this cause. It was found upon the issue of *non est factum* to be the deed of the defendant. Arguments were heard in banc, which turned wholly upon an alleged release of the agreement, which of course were unnecessary and irrelevant, until the agreement itself had been legally proved. Upon a point turning upon the release solely and not upon the agreement, relief was afforded to

the defendant upon the former verdict, and a new trial was granted, with liberty to the defendant to plead any new defence instead of his plea of release, which was set aside. The agreement meanwhile was in the power and possession of the court, not of either party. Still I cannot say that a legal necessity did not in strictness remain for proving the issue of *non est factum* before the second jury, in the same manner as upon the first trial; but after the proceedings which have been had in the cause, to take such an objection in such a stage was certainly rigid, and should not be countenanced further than the court are absolutely bound. I think in this case we ought not to give effect to it, because it was not distinctly raised upon the trial. The defendant's counsel had told the plaintiff's counsel he would admit the execution of the agreement, but at the same time stated he would find that not sufficient, or some expression of that kind, not however explaining his objection or plainly declaring that he meant to exact the production of the original agreement, which was mutually understood to have been mislaid. The parties proceed to trial, and then the objection is taken to the secondary evidence produced, not however explaining that the exception was made against the production of *any* secondary evidence—the cause was allowed to proceed, the exact nature of the plaintiff's objection never having been precisely declared or understood, and the defendant having in fact been intentionally silent on that point, as was avowed in the argument last term. The judge overruled the objection, thinking the evidence good secondary evidence, and supposing and being left to suppose that that was the whole extent of the question intended to be raised; and he might well think so, for he heard the defendant's counsel admit the agreement in court, and heard him reason to the jury upon its contents and its legal effect, and examine witnesses in relation to what had been done under it. This being so, I think we are entitled to say, that as there is certainly not the least degree of merit in the objection, if the party meant to avail himself of it he should have taken his ground distinctly at the trial, and stated his exception not ambiguously but specifically. If

he had done so, we must have decided now as we might think the judge ought to have decided at *Nisi Prius*; but we are not compelled to give way to technical objections not bearing upon the justice of the case, unless they were taken at the trial, and were such as ought to have prevailed there. Had the objections which the defendant's counsel had in view, but did not state, been announced at the trial, it is possible it might have been found capable of being cured by amendment, and I am inclined to think that rather than allow such an objection, under such circumstances, to defeat the ends of justice, we ought to suffer the record to be amended now; but I think we are not obliged to entertain the objection, and therefore upon this point, as well as upon the others which have been moved, I am of opinion for the plaintiff, and I think the *postea* should be awarded to him.

SHERWOOD and MACAULAY, J. J., of the same opinion.

Per Cur.—Rule discharged.

DOE EX DEM. NEILSON V. GILCHRIST.

Where evidence was given to shew that a deed had been procured by fraud, and the jury negatived the fraud, but there seemed great doubt as to the correctness of their finding, a new trial was granted on payment of costs.

Ejectment for the north part of No. 5, fourth concession of Ernesttown. The lessor of the plaintiff made title under a conveyance to him from Peter Gilchrist, dated 20th September 1833, and he proved Peter Gilchrist to be in possession as owner at the time he conveyed. The deed conveys 35 acres, the north end of the lot, describing it by metes and bounds. The grantor executed it by affixing his mark and seal, and the deed is witnessed by John B. Fralich and Abraham Neilson. For the defendant, it was attempted to be proved that the deed was obtained fraudulently. The grantor, Gilchrist, is a man of very advanced age (96 years old), who has not ordinarily transacted business for many years past; he was proved not to have lost his faculties, but to be capable of being made to understand any ordinary matter, if carefully explained to him; he had a son, William, who lived with him on a part of this lot, and had done so

for more than 26 years, taking care of the old man and finding him with necessaries ; he had also another son, Duncan, and a grandson, Peter, who, by the old man's permission, occupied a part of this same lot. On the 23rd November, 1826, a deed had been taken from the old man, Peter Gilchrist, to one Samuel Neilson, father of the lessor of the plaintiff, for 10 acres of the north end of this same lot, which had been sold to him through the agency of William Gilchrist. This deed, like the other, is subscribed by the grantor, by affixing his mark. It was never registered ; and it appears that Samuel Neilson, having afterwards sold these 10 acres to the lessor of the plaintiff, William Gilchrist bargained with the latter to sell him 25 acres more of the north end of the lot, and the deed was drawn out which the lessor of the plaintiff advances in this action as his title, purporting to be a conveyance from Peter Gilchrist, senior, to the lessor of the plaintiff, for 35 acres of the north end. This deed was taken to the old man to be executed by him—William Gilchrist, the lessor of the plaintiff, and the two subscribing witnesses, being present—and he was told that the lessor of the plaintiff having bought the ten acres of his father, whose deed had never been registered, he wished to take the title direct from him (Peter Gilchrist), to save the expense of registry. An offer was made to read the deed to the old man, but he waived it, and signed the deed, never having been informed, as it appeared, that the deed included 25 acres besides the 10, and never having been told of the bargain which his son William had made with Joseph Neilson for those 25 acres. The fair inference from the evidence seems, that Gilchrist signed the deed under the impression that it conveyed ten acres and no more, and what was said to him by the grantee was calculated to produce that impression.

On the other side, it was sworn by William Gilchrist that the old man had entrusted him to make similar bargains, and had ratified them ; and that he had no doubt that if he had taken the trouble to explain this transaction to him, he would have made no difficulty about executing this deed ; but it was not explained to him, and the grantee stated un-

truly the object and contents of this deed, while the others stood by and allowed the old man to act under the false impression so produced. Some time after the deed was obtained, William Gilchrist informed his father of what it contained, and then it is stated he was displeased, and made a deed to his son Duncan of the 25 acres.

Besides excepting to the title of the lessor of the plaintiff, on the ground of imposition in procuring the deed, the defendant gave in evidence a deed dated 22nd April, 1833—from Peter Gilchrist, senior, to his son William—of the whole farm, 190 acres, including the 25 acres for which the action is brought—which deed was not registered till 4th November, 1833. It purports to be made for a money consideration of 100*l.*; and it was contended that from this deed it appeared that the fee was out of Peter Gilchrist at the time of his making the deed to the lessor of the plaintiff of the 35 acres, upon which this action is brought. This deed, it was explained, was not in fact made upon any money consideration paid or to be paid, but was given in consideration that William Gilchrist had and would support and take care of his father and other members of the family. No bond or security, however, of any kind had been given for assuring future maintenance to the old man—nor was evidence given of any previous debt being acknowledged to be due by him to William, on any account. It was stated by William Gilchrist, that not having registered this deed he was induced to apply to his father to convey the 35 acres direct, instead of making the deed himself—but he did not account for his not having registered or chosen to register the conveyance for the valuable property—nor why, having delayed it till November, he chose to register it then—since the same expense of registry incurred before he took the deed from his father to Neilson, of the 35 acres, would have answered all purposes, and prevented the necessity of the disingenuous practice that seems to have been resorted to in obtaining that deed. On the part of the lessor of the plaintiff it was maintained, that the fact of the old man having actually conveyed the title in the land to William Gilchrist, as the defendant had shewn, repelled the

idea of any imposition being intended in taking this deed for 35 acres, since it shewed that in fact he had meant to part with all beneficial interest in the property—and therefore, although from the omission to register the deed to his son he might still hold the legal title, it was not reasonable to suppose he could have objected to any disposition which William might make of it. From thence it was agreed that the forbearing to explain to him what the deed to Wilson really did contain, could not have been from a fraudulent motive. The Chief Justice, who tried the cause, told the jury that if they were of opinion that when the old man executed the deed of 35 acres, he was designedly led to believe that he was only conveying the ten acres formerly sold, they should find for the defendant, notwithstanding an offer was made to read it to him, and notwithstanding it might be thought he had no interest in the land; for he should have been allowed to judge whether he would make a conveyance or not, and should not have been deceived as to the contents of the deed he was asked to sign. That if, on the other hand, there was no intention to keep him in ignorance of the truth, either on the part of William Gilchrist or Joseph Neilson, then the not reading the deed to the old man would not signify, although he was illiterate, because they offered to read it to him. The jury found for the plaintiff.

A rule nisi to set aside the verdict was obtained last Michaelmas term, and was argued in Easter term by *Bidwell* for the plaintiff, and *Sullivan* for the defendant.

ROBINSON, C. J., delivered the judgment of the court.

My own impression at the trial was against the validity of the deed for the 35 acres, and I did not expect that the jury would have found it to be fairly obtained; I expected that their verdict would have been for the defendant, and thinking so, I did not apply myself so particularly as I should otherwise have done to that part of the case which respected the prior conveyance of the whole 190 acres given to William Gilchrist.

Unquestionably, if that deed, though not registered, was valid—unsupported too as it was by any money considera-

tion—it did vest the estate in William, and disable Peter Gilchrist from conveying the 35 acres by the deed of September, 1833 ; but, on the other hand, it is to be considered that the person in whom it would have vested the title (William G.) was the very person who subsequently sold the 25 acres to Joseph Neilson, and received the consideration for it, and at whose instance the deed was taken from the old man ; in substance and effect the title was derived from him to the lessor of the plaintiff, and as he could not be allowed afterwards to defeat that title by shewing that he was seised of the property himself, so a stranger cannot set it up to defeat the same title. In this point of view, it is perhaps as well that stress was not laid upon the effect of that deed ; and I am by no means satisfied that all was fair in respect to that conveyance.

But still the question remains, whether the verdict of the jury upon the validity of the lessor of plaintiff's deed for the 35 acres, is consistent with the evidence. I did not at the trial, and do not at present, feel satisfied with the transaction. Its whole complexion I think unfavorable. The deed for 190 acres, instead of removing any cause of suspicion, tends in my mind to excite further doubts whether there has not been a combination to impose upon the weakness of this very aged person. I am not satisfied whether all was right in obtaining that deed ; and as great care should be shewn by courts of justice in protecting persons circumstanced as this old man seems to have been, and in discouraging attempts to inveigle them into conveyances of their property, I think the ends of justice require that a new trial should be granted on payment of costs, so that the parties may come fully prepared to lay open before another jury all the particulars of these very questionable transactions.

SHERWOOD and MACAULAY, J. J., concurred.

Per Cur.—Rule absolute on payment of costs.

RADENHURST V. McLEAN & McPHERSON.

Where an attorney directed a sheriff not to give up the goods of A., seized under an attachment as the goods of B—Held, that he became a trespasser by such direction.

In this case, McLean, the sheriff of the Midland District, and McPherson, the attorney for one Robertson, in a suit against one McKenzie, were sued as trespassers for having seized goods to a large amount upon an attachment which Robertson had sued out against McKenzie; which goods, it is alleged, were the property of Radenhurst, the plaintiff. It appeared in evidence that McKenzie was a merchant usually resident in Kingston, who had also a retail shop in the town of Hallowell kept by clerks in his employment. He became involved in debt, and the plaintiff, who is a clerk to Mr. McGill, a merchant in Montreal, was sent up to Hallowell in October 1833 for the purpose of obtaining security for the debt. McKenzie agreed with him there, to make an assignment to him of all his goods remaining on hand, upon trust, to dispose of the same and to divide the proceeds ratably among his creditors, whose names were inserted in the instrument drawn up on the occasion. An inventory was taken of the goods and annexed to the assignment. The papers were drawn up by a gentleman of the bar, Mr. Fairfield, and executed in his presence. A symbolical delivery took place of the goods, and Radenhurst constituted one Smith, a magistrate living in Hallowell, his agent, empowering him to superintend the disposal of the goods and manage them to the best advantage. For some days after this the shop remained closed, as Robertson, one of the clerks who had charge under McKenzie, was dismissed for some fault found with him. Afterwards another clerk named Cunningham, who had been in the service of McKenzie in the same shop, was placed in charge by Smith by recommendation of McKenzie, and the business went on as usual. The sign of McKenzie was not taken down; the accounts, it appeared, were kept in the same form as before the assignment; and a customer who continued to deal from that time until Christmas at the shop, swore he was not aware of any change having taken place.

The proceeds were paid over by Cunningham to Smith. Radenhurst, after the completion of the transfer, left Hallowell, and took no further steps personally in the matter, either by notifying the creditors, named in the bill of sale, of the trust that had been created in their favor, or doing any other act, so far as the facts appeared in evidence. McKenzie returned to Kingston, and was not shown to have afterwards gone to Hallowell or assumed any control over the business there. Robertson, the clerk to McKenzie, was aware of the assignment to Radenhurst at the time it was made, and witnessed the delivery of the goods. He was the brother and agent (as it appears by the affidavits filed since the trial), of Kenneth Robertson, the plaintiff in the attachment, who was included in the assignment as one of the creditors who were to share ratably in the proceeds of the goods. It was not shewn that either through his brother or by Radenhurst, or in any other manner, this Robertson had been made aware of the assignment; and in January 1834 he sued out an attachment against the goods of McKenzie, who had, it seems, absconded in the meantime. Upon this attachment, one Maguire, a sheriff's bailiff, seized the goods in the shop where they remained exposed for sale and in the course of being sold, under the immediate charge of Cunningham and a young lad who had also been in McKenzie's service, and the occasional superintendence of Smith,—the appearances to the world being the same in all respects as before the assignment. Upon the seizure being made, and before any of the goods were removed, Smith interposed, and both he and Fairfield remonstrated with Maguire and with McPherson the attorney, shewing the latter the bill of sale, of which it seems he had before been apprized. McPherson read the assignment, but would not authorize the bailiff to relinquish the seizure. On the contrary, he declared that he considered the whole a sham, and that he would proceed as he had begun, and he desired the bailiff to do his duty. Afterwards the deputy sheriff sent him a note by his bailiff, expressing his willingness or desire to give up the goods if McPherson had no objection; but McPherson forbade the

goods being given up, and said he would prosecute the sheriff if he restored them. Upon this evidence the jury, under the direction which the Chief Justice gave them, found for the plaintiff for the value of the goods included in the inventory annexed to the bill of sale to Radenhurst, deducting the value of the goods stated to have been sold in the meantime. The question whether the assignment was *bona fide* or a merely colorable transaction intended to cover the property from McKenzie's creditors, upon an understanding between the parties contrary to what the deed imported, was expressly submitted to the jury. It was made a question whether McPherson had incurred any liability by the course which he had taken; but the Chief Justice told the jury that he was liable if the seizure was unlawful, inasmuch as he had recognized it, and shewn himself determined to adhere to it and abide by it. A legal objection was taken to the sufficiency of proof of the authority from the sheriff to Maguire, as bailiff, from the peculiar manner in which the warrant was executed—namely, by a person who usually wrote as a clerk in the deputy sheriff's office, and who was in the habit, as he said, of signing the deputy sheriff's name with his general permission, to papers of this kind. However, as the deputy sheriff had recognized the seizure, the Chief Justice overruled the objection.

In Michaelmas Term last, the *Solicitor General*, on behalf of the defendants, moved to set aside this verdict, and for a new trial, arguing that, under the circumstances, McPherson was not liable, and producing affidavits to shew that since the trial it had been discovered that Smith gave receipts for the monies paid over to him by Cunningham, in the name of McKenzie, and that after this action was brought he got up these receipts and gave others differently expressed, and that McPherson was disabled by illness from attending at the trial, as well as Maguire, whose evidence was stated to be important. *Bidwell* shewed cause, and now judgment was given.

ROBINSON, C. J.—Upon a mature consideration of the case, it is determined that the rule for a new trial shall be

made absolute on payment of costs. My brothers, for reasons which they will probably explain, are not either of them fully satisfied that the plaintiff's recovery is consistent with the law and justice of the case. Doubts are entertained by one of my learned brothers upon the point of McPherson's liability under the facts proved, and the general complexion of the case is, in the view of my other learned brother, more strongly indicative of *mala fides* than I consider it to be ; and I infer it to be his opinion that the case should have gone to the jury with observations more decided against the apparent fairness of the transaction than I can state mine to have been. I cannot conscientiously say that, upon the evidence given, I view the case now in a light more unfavorable for the plaintiff than I did at the trial. I continue of the opinion that, upon the facts and declarations proved, McPherson was legally liable as well as the sheriff,—and, indeed, with more reason than the sheriff, if the goods were in fact not the goods of McKenzie. And upon the other point, whether the assignment was *bona fide* or colorable, it was left to the jury to determine, under an impression however, which I certainly did entertain at the trial, and still do entertain, that there was no secret trust—no fraudulent design or unfair contrivance. There were certainly several circumstances proved which the law warrants us to regard with suspicion ; but they were susceptible of explanation : and a consideration of the whole case left no strong impression upon my mind that the assignment was otherwise than real, open and fair. In that respect I am not dissatisfied with the finding of the jury. A new fact is brought before us in the affidavits filed—namely, that Smith gave receipts to Cunningham for the money obtained from the sale of the goods, in which receipts he expressed the money to be paid to him on the account of McKenzie ; and that after this action was brought he got back these receipts and gave others in a different form, expressing the money to be paid to him on account of the creditors. This fact, it is sworn, was not discovered till after the trial ; and McPherson applies for a new trial on the further ground, that he was disabled by illness from

attending the trial, and he states what passed between himself and the bailiff Maguire in a manner very different from the account given at the trial. Maguire was not himself examined at the trial, being dangerously ill at the time. Without going further into the statement respecting the receipts and the manner in which it is met—as it is desirable it should go to the jury without prejudice upon another trial—I will only add that I do not think it fit, under the circumstances of the case, that a verdict for so large a sum should be confirmed when a majority of the court entertain doubts respecting its propriety, though not upon the same grounds; and in consequence of these doubts, as well as upon account of the illness of one of the defendants and of Maguire, which materially strengthens our inclination to grant a rehearing, or allow a new trial on payment of costs.

SHERWOOD, J.—I am of opinion the assignment of the goods to the plaintiff, as trustee for the creditors of McKenzie and for their benefit, was legal, according to the decisions in 8 T. R. 621, 8 D. & R. 95, and 2 Ch. Rep. 564; and therefore I have no doubt the action might have been sustained against the sheriff alone; but I incline to think the attorney, Mr. McPherson, is not liable under the evidence given at the trial. It was not proved the attorney gave any order or direction to the sheriff, or to his officer, to seize the goods under the attachment in favor of Robinson. After they were seized by the sheriff, he refused his consent on the part of his client to the giving up possession of them by the sheriff, and went so far as to say that if the goods were given up he would prosecute the sheriff, and that the officer should go on and do his duty. Now it is very clear that McPherson did not command, aid, or assist in the seizing of the goods, and therefore, if he be liable to this action, it must be upon the principle that he agreed to the seizure after it was made, and thereby adopted the act of the sheriff as his own act, which is contended to be tantamount to a command to do the act. The rule of law which makes a subsequent assent to a trespass the same as a prior command, is not so broad as to embrace the present case, according to my view of it. In 4 Inst. 317, it is said that

“by the common law, he that receiveth a trespasser and agreeth to the trespass, is no trespasser, unless the trespass were done to his use and for his benefit, and then his agreement subsequent amounteth to a commandment.” Hawkins, 2 c. 29, § 4, says, “It seems agreed that whosoever agrees to a trespass on lands or goods *done to his use* becomes a principal in it.” I think it cannot properly be said that McPherson subsequently agreed to the trespass for his own benefit, because he was acting for his client at the time and not for himself; and I cannot say he went beyond the line of his duty in expressing his opinion in favor of the seizure by virtue of the attachment, or in candidly stating his intention of prosecuting the sheriff if he gave up the goods; and looking at all the circumstances of this case as detailed in evidence, I am not surprised that the attorney for Robinson entertained an opinion against the fairness of the transaction; and indeed, had not the verdict of the jury negatived the existence of fraud, I should think the arrangement between the plaintiff and McKenzie rather questionable in its appearance and manner of execution, and therefore conclude the attorney honestly thought it was illegal. There is an essential difference, in my opinion, between the ordering or directing of an attorney to do a certain act, and the giving an opinion in favor of another person’s act, or professionally endeavoring to sustain the legality of an act done by another. If an attorney order an act to be done for the use of his client, he is considered in law as much an actor as his client, and equally liable in damages if the act be illegal, as appears by the cases of *Barker v. Braham et al*, 3 Wil. 368, and *Stevens et al v. Elwal*, 4 M. & S. 259; but I find no case which goes the length of establishing that an attorney acting professionally would be liable as a trespasser for subsequently endeavoring to support the legality of a person’s act in which he had no agency; and, upon principle, I am not satisfied that any such action would lie. My present impression is that it would not, and the remarks of Lord Kenyon in *Sedley v. Sutherland et al*, 3 Esp. 202, which were incidentally made in the course of that trial, have a tendency to strengthen the impression.

Mr. McPherson does not appear to have been a volunteer in any part of the transaction. He did not go to the office and request him not to give up the possession of the goods, but the officer came to him to ask his consent, which he declined giving, but said the officer should go on and do his duty. He gave no directions for the disposal or the custody of the goods, but only insisted in general terms on the officer doing his duty. After the finding of the jury in this case, I think it must be considered that a trespass has been committed by the sheriff's officer, and consequently by the sheriff himself, who is answerable *civiliter* for the acts of his officer; but it does not thence follow that every person concerned in the transaction is a trespasser. The case of *Wood v. Haydon et al*, 2 Esp. 552, draws the line of distinction, in some degree, between persons concerned in an affair of business who are liable to actions and who are not. It was an action of trover for illegally seizing the goods of the plaintiff as a distress for rent due from a third person; and it appears in evidence that one of the defendants was a broker, and assisted the other defendant, for whose use the goods were taken, by making out an inventory of the goods and drawing a notice to be served on the plaintiff. He never had the possession or disposal of the goods. Lord Kenyon ruled that the mere act of making an inventory, or drawing a notice, was not sufficient to subject him to an action. The case of *Sedley v. Sutherland et al*. was an action of assault and false imprisonment brought against the assignees of a bankrupt and their solicitors and others. Upon the case being opened, Lord Kenyon said he thought the action could not be maintained against the attornies unless it could be proved that they had gone beyond the line of their duty, by which the plaintiff had suffered. It was then alleged that it could be proved that the attornies had written a letter ordering the arrest. Lord Kenyon said he thought that circumstance only not sufficient. The case of *Bodkin v. Chancellor et al*, Cowp. 476, bears upon the same point. Chancellor was a pound-keeper, and received and impounded the plaintiff's cart and horses, which had been seized contrary to law. Lord

Mansfield said, in reference to a pound-keeper, "If he goes one jot beyond his duty and assents to the trespass, that may be a different case; but here he has done nothing beyond his duty." The pound-keeper refused to deliver up the goods to the rightful owner till his fees were paid, and the plaintiff was obliged to pay the fees before he could get his property. The plaintiff's counsel contended that by detaining the goods till the fees were paid he had assented to the trespass and adopted it as his own act, but the court thought otherwise, and held him not liable.

My brothers agree in opinion that the acts of the attorney in this case make him a trespasser, and I think it probable they are right; but I have not been able to satisfy myself that the attorney was a trespasser, and therefore cannot concur in their opinion at this time.

Per Cur.—Rule absolute for new trial on payment of costs.

WILCOX v. BURNSIDE.

Where the plaintiff agreed to build a house for the defendant, who paid a certain sum in advance, and gave the plaintiff permission to make the bricks of which the house was to be built on his land, and to sell any surplus, and the plaintiff not proceeding with the building, the defendant seized some bricks which the plaintiff had made, and a number of articles belonging to the plaintiff: Held on trover brought by the plaintiff for the value of the bricks and the other articles, that no damages could be recovered for the seizure of the bricks, as under the agreement they were the property of the defendant, and the jury having estimated their value in the damages, a rule was made absolute to reduce the verdict.

Trover. Plea—not guilty.

On the 22nd March 1835, the plaintiff agreed to build a house for defendant on a certain lot of ground in Toronto, and after specifying the works in detail, plaintiff agreed to *find all materials* to finish said house, and to have it done by 1st March 1833 for £450 currency, £150 to be paid in advance, and a free deed of the west half of No. 70 in the first concession of Whitchurch (for £200), and in one year from the time the house was tenantable, £100. After the agreement, defendant agreed verbally with plaintiff to allow him to make the bricks that would be necessary on the lot in question; and further, the kiln front made being bad, he allowed him to dispose of those bricks and to make others, and he did not restrict him to make the mere quan-

tity he might want for the house, but gave him leave to make a larger quantity and to dispose of the excess. The plaintiff not going on with the work, but, on the contrary, abandoning it, the defendant entered on the premises, seized a waggon, timber, a stove, and various utensils and articles belonging to plaintiff, and two kiln of bricks, which two kilns together contained many more bricks than were necessary for completing the house. The jury, on the trial of this cause, which was brought for the value of the articles thus seized, found a verdict for the plaintiff for £140, £60 of the sum was stated to be for the value of the articles taken to which the defendant could have no legal claim, and £80 for the value of all the bricks; and the question raised for the decision of the court was, whether the plaintiff was entitled to recover for all the bricks or for any part of them. If not entitled to recover anything for the bricks, then the verdict to be reduced to £60.

The case was argued in Easter Term by *Bell* for plaintiff and *Sullivan* for defendant.

ROBINSON, C. J.—I think upon the evidence that the plaintiff was fairly entitled to recover the full value of all the bricks which the defendant had allowed him to make beyond the quantity which would be required for building the house; but as the sum of £150 was to be paid in advance, we must presume it was paid, for the work was proceeded in to a considerable extent. Then that sum would be much more than sufficient to cover the value of the bricks; and, looking at the whole evidence as it regards the agreement, and the admissions proved to have been made by the plaintiff, I think the bricks necessary for building the house, though not put in the wall, must be considered as the bricks of the defendant, made for him and paid for by him, and acknowledged to be his by the plaintiff himself. I do not think that damages in respect to those should have been awarded to the plaintiff. But it does not clearly appear what would have been the number of bricks above the quantity required for the house, and as we cannot therefore modify the verdict to suit this view of the case, my opinion is that a new trial should be granted without

costs, unless the plaintiff will agree to enter his judgment for the £60 only.

Upon what terms the plaintiff was allowed by the defendant to make upon his lot the bricks which the plaintiff was bound to furnish, does not appear. It was a verbal permission—no witness gave evidence of the particulars. I consider that if the parties took into their consideration at the time of the permission asked and given, whether the plaintiff, having made the bricks, should be allowed to move and sell them to others, not even replacing them with any more, and failing to build the house, I cannot doubt that the defendant would have stipulated against this, and that the plaintiff would have acquiesced. Whether they did settle this point did not appear, for no one was shewn to have been present at the agreement; but in addition to the reasonable construction to be put upon such an agreement, the plaintiff is shewn to have expressly stated to others that he was only allowed to sell the kiln that was bad, and any number beyond what might be enough for the house, and that the others did not belong to him. That admission supports the justice of the case, and I think the jury were right in taking it as conclusive.

SHERWOOD, J., concurred.

MACAULAY, J.—It may in construction of law be proper to hold that the circumstance of the bricks being made upon the defendant's premises, out of his soil, with a view to the erection of a house for him (especially if the defendant has made adequate advances) under such a contract as that in evidence, would *inter partes* draw to the defendant a general property in them as being so made and dedicated to his use in the nature of the transaction, and this although a qualified property or interest might vest or remain in the plaintiff as the maker, and entitled to the possession for the purpose of executing his agreement, and although until attached to the freehold they might continue to be at the risk of the plaintiff, or if insufficient in point of quality, &c., the defendant might not be bound to accept them. And it may follow that the defendant's interest was such, that after adequate advances, and upon a failure in or breach

of contract on the plaintiff's part, he might elect to put an end to it, and possess himself of those materials and resist the plaintiff's action of trover by shewing such advances on his the defendant's part, and such failure on the plaintiff's part. Still, however equitable all this may be, I have not been able to ascertain any settled principles of law upon which I could rest such a position; though I feel my sense of justice strongly addressed in favor of it in cases where the contractor may be in insolvent circumstances and wasteful, and where the party having made advances, may be apparently without remedy if obliged to rely exclusively on the contract. Yet it is a well settled rule of law, that when an executory contract contains independent provisions on either side, not concurrent or containing conditions precedent, each is driven to rely upon such contract for redress. In the present case, it appeared to me at the trial that the parties had entered into an executory agreement containing independent conditions; that the plaintiff had agreed in writing to erect a house for the defendant by a certain time, and find materials on the one hand, and that the defendant had agreed to advance a certain sum in the first instance, and to make subsequent payments on the other; and I assumed that the defendant had, as alleged, made such preliminary advances. It did not appear that anything was said in the original contract touching the making of brick, but rather that the defendant afterwards authorised or gave license to the plaintiff to manufacture them on his premises, anticipating naturally that they would be used in the proposed structure; but no condition being expressly added that the property in such bricks should vest in the defendant. I considered that bricks made out of the soil of another, even if in itself a trespass, would become the property of the maker—that the property would be changed, and that the owner of the soil used could not claim them as his after being burnt, because they had been made out of his earth excavated upon his land. I also considered that *a fortiori* brick made out of the soil of the defendant with his assent, would vest in and belong to the maker, unless from the nature of the agreement or of the

circumstances, it could be intended in law, or presumed in fact, as the agreement of the parties that the property was to be in the owner of the soil, in which event it would rest in him *ab initio*; and the clay in the beds, and each brick as moulded, would be his quite as much as in the kiln when burnt and ready for use. I did not consider that in this case such was to be the inference to be drawn in law or in fact. I conceived that the plaintiff was at the risk of the brick, that any failure or loss in the making would be his, and that the defendant was in no way interested and at no risk of loss in any event, the plaintiff being bound to provide him good and substantial building materials. If the brick did not rest in the defendant from the beginning by reason of his advances and license—if the property in them was exclusively in the plaintiff until they were burnt, and afterwards until he made default in his agreement—I did not see how they could become the defendant's at his election, by reason of such breach. I did not see how such breach could impart to the defendant an election to make bricks his own which were not so before, nor work a change of property in his favor. In short, I regarded the brick precisely as if the plaintiff had purchased them elsewhere and had carried them to defendant's premises with a view to place them in the house he had agreed to build and for which he had received advances, but which it was suggested he had failed to do. It appeared that the first made bricks failed in quality and were not fit to use in the building; that in consequence, the defendant gave the plaintiff leave to sell them and make more the ensuing year. The plaintiff of course failed to erect the house according to the written contract; but it seemed the parties still desired to go on—in short, that the time was indefinitely extended; the written specification, however, being the basis of the continuing contract by parol. It appeared that the plaintiff, accordingly, made more bricks and more than sufficient for the house, and that he from time to time sold portions of them; that he had commenced the house but made slow progress; that the defendant became dissatisfied and in the apprehension of a failure on the plaintiff's part,

and that he would make away with all the materials provided, including the bricks, he took possession of the whole to the exclusion of the plaintiff. In this action of trover, I considered it necessary for the plaintiff to prove property and right of possession. He was in actual possession at the time of the conversion, and if entitled to the property he was necessarily entitled to continue his possession also.

Then the question was, whether the defendant had such right of property and possession as entitled him to dispossess the plaintiff. Not seeing any specific agreement touching the property in the bricks, or that the defendant did more than merely license their being made on his land and out of his soil, with a view to the house in the course of erection at the period of the conversion, it still formed a question in my mind, whether the defendant had any right of property in the bricks or other materials until attached to the freehold, although provided and brought there by the plaintiff with a view to being used in the house. It still appeared to me, that unless a right of property accrued to the defendant in law by the nature of the transaction, none could be conferred by the plaintiff's breach of contract—the remedy for which rested in an action on such contract. And I did not think that a license to make bricks on his lot, though with a view to the house, clothed him with any right of property so as to enable him to assume possession adversely to the plaintiff; for I thought that if he had a right of property, it must subsist either as a result in law, or by the agreement, independently of any breach of contract, and that he might equally assume adverse possession though the plaintiff adhered to his agreement. Separating the transaction from all question of breach of contract, and resting it upon the mere circumstances of the original advance and subsequent license, I did not see a right of possession in the defendant, or that connected with a breach of contract such right would arise, or, if it previously subsisted, that such breach would draw to the defendant a right of possession so as to legalize his dispossessing the plaintiff. It is true an agreement might be so moulded as to vest building materials in the owner of the estate as fast as

provided and while in course of preparation, and that a change of property may be sometimes held to have resulted in law under the circumstances of the parties, the nature of the transaction, the subject matter of the contract, and the course and extent of the payments or advances made ; but I did not feel at liberty so to construe the present. I thought all the materials were at the risk of the plaintiff, subject to his control and disposal until made the defendant's by being fixed to his freehold. I did not think they could belong to both, or partly to one and partly to the other, but wholly to the plaintiff until delivered to the defendant. I thought the creditors of the plaintiff, or the plaintiff himself, could dispose of all or any until the possession was changed by delivery to the defendant, which could not be intended in the absence of proof *aliunde* until attached to the building. I have looked at the case of Woods v. Russel, 1 D. & R. 587, 5 B. & A. 942, and do not think it analogous. The case of Munklon v. Mangles, 1 Taunt. 318, is more in point. In the former, the advances made were paid with a view to the specific vessel, and the materials provided for the same, and there was an actual delivery of the hull, which might be well held to include as a part of the whole, or as appertaining to the main body of the ship which was delivered, the rudder and rope lying in the house of the builder. Being already provided, they might well be regarded as contemplated and included in the delivery proved ; and as I have intimated above, when payments are made to depend upon the progress of the work and the quantity of the materials provided, the property in all materials so provided, though not actually used, may be treated as vested in the party paying, where the advances are made with a view to them specifically ; and in the present case the same rule would be applicable, if it could be intended that the advances made by the defendant were not under the contract generally but with a view to a specific portion of the materials and to the bricks in particular. Such did not seem to me to be the fact, the bricks not being in *esse* when the advances were made under the contract, and which advances by the contract were a general payment, not with a

view to anything in *esse* or to any specific article to be provided or made except a house.—3 B. & C. 419 ; 5 D. & R. 279 ; 7 B. & C. 26 ; 9 D. & R. 791 ; 2 B. & A. 248.

My learned brothers, however, take a more favorable view, and (assuming the defendant's alleged advances and the plaintiff's breach of contract and wasteful disposition) one more consistent with the real justice of the case. They also think I should have laid more stress upon the plaintiff's admissions of the defendant's right, as proved by some witnesses, and that it might have been fairly left to the jury to infer a tacit or mutual understanding, that in consideration of the defendant's allowing the bricks to be made on his lot, the plaintiff agreed that the general property in them should vest in him so as to secure their exclusive application to his use and to protect the defendant against creditors of the plaintiff or any claiming through him adversely to defendant, and so as to justify him in taking them out of plaintiff's possession if dissatisfied with his conduct under the agreement. I confess I attached little or no importance to what the plaintiff was proved to have said to others than the defendant, the occasion explaining away, in my estimation, the effect of his representations, and the real nature of the transaction, as previously developed, leading me to place upon it a different construction. I am not however, upon more reflection, prepared to say that it ought not to have been left to the jury as a matter of fact to say whether the plaintiff had not agreed that the property in the bricks should belong to the defendant, with leave to infer it from the circumstances ; but I am still strong in the impression, that if a right of property in the defendant cannot be assumed either as a matter of agreement or as a result in law under the circumstances, it cannot result from a breach of contract on the plaintiff's part. Whatever rights of property the defendant can claim or exercise, he must, I think, establish without denying aid from a breach of the plaintiff's executory agreement. If he had, independently thereof, a right of property but no right of possession, it might confer a right of possession, but certainly no right of property ; and I am not prepared to say

a right of property *inter partes* could be held to result in law from the other circumstances, supposing there was no agreement, express or tacit on the subject; but I am disposed to think it might have been made a question for a jury whether the agreement or understanding between the parties was not such that the defendant had the right of property in consideration of his allowing the use of his land and soil for the brick after making large advances, and being a reasonable protection, the jury might have felt no great difficulty in presuming or inferring it if left at liberty so to do. In this point of view, I feel enabled to unite in the conclusion to which my brothers have arrived, though upon different grounds. At the trial, I took the question on the part of the defendant to be of a general nature, viz.: whether bricks made on the premises and out of the soil of the defendant, and with or without his assent, did not in law belong to him, upon the principle that the property had not undergone any change, as held in the case of *Baker v. Flint*, Hil.T. 3 W. IV., or whether under a written agreement for the erection of a brick house, the contractor undertaking to furnish all materials, with leave to him reserved or super-added by parol to make the bricks upon the premises and out of the soil of the person for whom the house was to be built—such person undertaking to make advances, not according to the progress of the work and the amount of materials provided, but in anticipation or periodically—the owner of the premises would acquire or could assert a right of property in the bricks made by the contractor, under or with a view to the performance of such contract, so as to entitle him to dispossess the contractor thereof without subjecting himself to an action of trover at his suit, especially if he as the defendant could shew a breach of or failure in performance of such contract on the part of such contractor, and payments in advance sufficient to cover the value of the materials in question. To these questions I was not prepared to give an assent in favour of the defendant, and though not without some doubt on the latter proposition, I am not yet satisfied that such assent could, consistently with the rules of law, be granted. And the

question occurred to me whether, admitting a general right of property in the defendant, and a right of possession only in the plaintiff, the plaintiff is not on the one hand entitled to his action of trover by reason of such qualified right to recover such damages, and the defendant on the other hand at liberty to shew his right of property in mitigation of damages, to prevent the plaintiff recovering the full value.

Per Cur.—Rule absolute for new trial without costs.

Mem.—The plaintiff afterwards elected to take judgment for the 60*l.* only.

BREAKENRIDGE V. KING.

An amendment in pleadings will be allowed after the assessment of contingent damages on a demurrer subsequently decided against the plaintiff, where the justice of the case requires it, and the plaintiff would be finally concluded.

Dower, *unde nihil habet*. The tenant pleaded—1st. Non tenure of all the premises in respect of which dower was demanded, except of two equal undivided third parts of a small portion of the land which was specified in the plea. 2nd. In respect of that part for which he did not disclaim, that during the coverture of the demandant, her husband being seized in fee of certain other lands, devised a part of them to her for her life in full bar and satisfaction of her dower, and after his death she agreed to and ratified the devise. To these pleas the defendant filed a general demurrer. Upon a third plea of *ne unques accouple*, the parties were at issue, and the demandant carried down her record to trial to try this issue, and to assess contingent damages upon the demurrer. The court expressed their opinion last term in favor of the tenant upon this demurrer, whereupon the demandant's counsel prayed for leave to withdraw the demurrer, and reply to the first and second pleas. Which was opposed on the authority of the case of *Robinson v. Rayley*.—1 Bur. 321.

Sherwood, H., for demandant—*Bidwell* for tenant.

ROBINSON, C. J.—In the case of *Phillips v. Smith* in this court, we were much pressed to allow an amendment of the pleadings as in the present case, after an issue had

been tried and contingent damages assessed on the demurrer. We were inclined to have done so. We should have granted the indulgence if the record had not been taken down to trial; and to save costs and trouble to the parties we should probably have done so, notwithstanding the trial and assessment of damages, but the case of *Robinson v. Rayley* was a strong authority against the amendment, and after much consideration we refused the leave to amend. In that case, however, of *Phillips v. Smith*, the judgment on demurrer did not finally conclude the party upon the merits. It merely made an end of that action, and did not bar the right.—*Vide Str.* 1002; 5 B. & A. 896; 3 Taunt. 81; 2 B. & P. 243; 7 T. R. 132; 1 T. R. 782; 1 H. Bl. 238; 2 T. R. 126; 2 Bl. Rep. 920; Sayer 285; Bur. 756, 2693.

In this case, the plaintiff, instead of taking issue upon the substantial matters of defence urged to her claim of dower, demurs to the pleas, and thus admits the truth of the defence. We have held the pleas to be good, and the consequence of that judgment is to conclude the plaintiff. The defence pleaded, moreover, is a bar to a right of dower, which would otherwise be a continuing right, so that the effect extends beyond the present action.

With respect to the plaintiff's claim of indulgence, it is to be said on the one hand, that she has created the difficulty which she now meets with by voluntarily proceeding to trial before these demurrers were disposed of; on the other hand, we must admit in her favor, that her demurrers were not frivolous, but were really intended to bring important legal questions under consideration, and that upon one of the points at least there appeared to be authority in her favor, on which she may be excused for relying. Weighing both these considerations, and seeing that the costs and inconveniences of delay occasioned by the demurrers fall upon the demandant, we think that the ends of justice would be but obtained by allowing the plaintiff to withdraw her demurrer. If we refused the application, we should do so because we considered the case of *Robinson v. Rayley* strictly applicable under the present circumstances,

and because we believed that case to be up to this time fully sustained by the Court of King's Bench in England.

In its circumstances, that case is so far not applicable, that Lord Mansfield in his judgment declared, that the application was without any favorable circumstances, and that the demurrers were frivolous. It is true that he does admit with the other judges, that after a trial no precedent for such an argument existed; and he does not appear to have questioned the broad ground upon which Mr. Justice Denison rested his judgment—namely, that the court *could not* grant the permission desired even if they *would*, for that the pleadings being no longer in paper but upon record, the court had not the power. This reason given by Mr. Justice Denison is utterly irreconcilable with very many modern cases, and indeed with cases which were decided soon after the time that judgment was given; for many instances can be produced from the reports, where the courts have allowed pleadings to be withdrawn or amended after a nonsuit, or a trial, for the express purpose of letting in a trial upon the merits, which, as the record stood, would have been precluded in consequence of some slip or erroneous opinion of the parties—or rather of their attorney or counsel. It is true that *Robinson v. Rayley* is referred to as authority in late books, but not without some question intimated as to the soundness of the decision. We have thought, and still think it right so far to defer to it, as to decline granting such amendments merely to save costs, and where the right, and especially a permanent or continuing right, would not be barred; but to allow it to stand in the way of the ultimate ends of justice, by refusing the leave in a case like the present, would be resting upon that authority more conclusively than we think the spirit of our laws, as now administered, and the principles of numerous decisions, would warrant. It was once held that a new trial could not be moved for after a nonsuit, because the plaintiff was out of court; but that difficulty is not now admitted. Again, even some years after the case of *Robinson v. Rayley*, the Court of Common Pleas held, in the case of *Parker v. Ansell* (2 Bl. Rep. 920), that after a

new trial granted, no amendment would be allowed on the record which could vary the issues to be tried. This decision is expressed as strongly as the decision in *Robinson v. Rayley*, and seems to proceed upon the very same principle; but amendments contrary to the authority of *Parker v. Ansell* have been since that time allowed, again and again.

Chief Baron Gilbert, in his treatise on the Court of Common Pleas, has this passage, which bears directly on the point before us: "The plaintiff declares and the defendant pleads, and the plaintiff replies and the defendant demurs, and the plaintiffs join in demurrer, and the question was whether the plaintiff should amend his declaration; and the true distinction upon the debate of the judges at Sergeant's Inn seemed to be this, that where there is a demurrer and joinder in demurrer, *if the cause be still in paper*, upon paying of costs, and giving the defendant liberty to alter his plea, the plaintiff may be at liberty to amend because the pleadings on paper came in only instead of the pleadings *ore tenus*, and in the pleading *ore tenus* the record was only in *fieri*; and therefore, though a man had joined in demurrer, he might come, *before that was entered of record*, and pray to withdraw his demurrer and amend; but after the pleadings were entered of record of the same term, then it could not be amended or altered. This arose upon the constitution of Ed. I., which forbids judges to alter or change any of the records or rolls of the court, and therefore *no alteration* can be made in a record unless *it be in the same term*, whilst the record is supposed to be in *fieri*; but out of this rule we must except all amendments made by virtue of the statute of Jeofails, for those enable the courts to amend at any time within the purview of such statutes."—p. 114.

In this doctrine laid down by Chief Baron Gilbert, we see the principle explained which seems to have governed the court in the cases of *Robinson v. Rayley* and *Parker v. Ansell*. But it is very evident that the principle is departed from and disregarded in the case of *Alder v. Chep* (2 Burr. 755), by the same judges who decided the case of *Robinson*

v. Rayley ; and from the other cases cited, which are but a few of a great number to be met with in the books, it is clear that the courts do not restrict themselves within the rule laid down by Chief Baron Gilbert.

Amendments are in every case so far a matter of discretion, that the courts may refuse to grant them when in their discretion the ends of justice do not require it. In this case, we cannot but feel that justice does require the amendment to be allowed if it be within our power ; and believing it to be within our power we do allow it, because we think the demurrers were intended *bonâ fide* to obtain the judgment of the court upon legal questions, which, not without grounds, were deemed material in the case ; and because we see that unless we do allow the plaintiff to withdraw her demurrers and reply, she will be finally barred as to any right of dower she might have in the premises in question.

SHERWOOD, J., and MACAULAY, J., concurred.

Per Cur.—Rule absolute to amend on payment of costs.

BANK OF UPPER CANADA V. CRAWFORD.

Where on an assessment of damages on a promissory note stated in the declaration to be for 40*l.*, a note for 42*l.* was produced in evidence, an amendment of the record to correspond with the proof was refused, but the court allowed a verdict to be entered for the amount of the note set out in the pleadings, on the other note being filed as the one in which the action was brought.

Assumpsit and judgment by default for want of a plea. On the assessment of damages, a note of hand for 42*l.* was produced, the note declared upon being for 40*l.* The declaration had a count upon an account stated. The question was, if the variance could be amended under the provincial statute, or if the note produced could be recovered on the account stated.

The court held, that since upon the judgment by default the note as set out for 40*l.* stood admitted, and no necessity to prove it existed, and so no variance could arise requiring an amendment, they could not regularly authorize the amendment, but that the judgment might be entered for the amount of principal and interest of the note as set out and

admitted, upon filing the note produced as that intended to be declared upon.

Per Cur.—Rule to amend record refused.

DOE EX DEM. ARMSTRONG V. ROE.

A declaration in ejectment cannot be served by the lessor of the plaintiff.

The court set aside the service of the declaration of ejectment in this cause, on its being shewn by affidavit that the party making the service was the lessor of the plaintiff.

Solicitor General for plaintiff—*Bidwell* for defendant.

BEALS V. SHELDON ET AL.

A note given by a partner for a private debt in the name of the firm, is not binding on the firm.

Assumpsit on a promissory note. Plea, the general issue. It appeared the note was given by F. R. Dutcher, one of the copartners of the defendants, in the name of the firm, and after the copartnership was entered into, but the consideration for the note was a debt for goods sold and delivered to F. R. Dutcher. The plaintiff called F. R. Dutcher as a witness, who proved that he bought the goods while he was sole proprietor of the concern; that on some arrangement with his copartners, he had authority to draw out a certain sum from the funds of the firm, and that he gave this note instead, with which he was to be charged. Other evidence was also given, from which it might be inferred that the other copartners were aware of this note, and that when F. R. D. retired from the firm, which was before this action was constituted, it formed a part of the matters taken into consideration on settling, and the firm had agreed to pay F. R. D. 1000*l.*, besides indemnifying him against the partnership debts. A nonsuit was moved for—1st. Because F. R. D. being a partner, was not a competent witness, although not joined in the action. 2nd. That the promissory note was given for the private debt of F. R. D., in the name of the firm without authority.

Macaulay, J., who tried the cause, allowed it to go to the jury, with leave for the defendant to move to enter a nonsuit.

The case was argued this term by *Draper* for the plaintiff and *Sullivan* for the defendant.—5 B. & C. 385; 2 C. & P. 305; 9 B. & C. 646; 4 M. & S. 475; 5 M. & S. 71; 10 Ea. 264; 1 Ea. 48.

The Court were of opinion that a nonsuit should be entered upon the second objection taken. The Chief Justice and Sherwood, J. thought F. R. D. a competent witness under the circumstances of the case. Macaulay, J., dubious upon this point.

Per Cur.—Rule to enter a nonsuit absolute.

BANK OF MONTEAL V. BETHUNE.

Where there was a verdict for the plaintiff, and the defendant did not move for a new trial within the four days, owing to a misapprehension on the part of his counsel that the plaintiff's counsel was to have disposed of the question of a new trial on the argument of a demurrer in the cause, without any rule, a rule nisi was granted *nunc pro tunc*.

This was an action of assumpsit, and there were several issues in law as well as an issue in fact on the record. At the last assizes for the Midland District, the issue in fact was tried before the Chief Justice, who reported the evidence as follows:—The promissory notes on which the action was founded, some made and others endorsed by the defendant, together with some letters of his, were admitted. On the defence, the plaintiffs' counsel admitted the law incorporating the plaintiffs in Lower Canada, and that the considerations for these notes were loans, part to the defendant and part to J. G. Bethune, made in bank bills of the plaintiffs by the plaintiffs' agent, at their agency office in Kingston, where the notes declared on were discounted; that the plaintiffs had an agency at Kingston, whose business and duty it was to cash drafts on the Bank of Montreal, to collect notes and drafts discounted at the Bank of Montreal in Lower Canada, and to discount notes for which he paid in bills of the Montreal Bank, signed and first issued at the Bank of Montreal; further, that when loans were made, the interest for the ninety days was deducted when the notes were discounted, and that such was the general usage at the office and at the banking institutions in the province; and that the Montreal agency

in Kingston had existed four years and a half. The plaintiffs had a verdict, the Chief Justice noting that he reserved no point, but that the defendant could move upon any ground which the case as made out opened to him. The demurrers were argued in Hilary Term last by *Sullivan* for the plaintiff, and *Sherwood, H.*, for the defendant; and in Easter term, when the court were about to give judgment on the demurrers, the defendant's counsel claimed judgment also on other legal questions which he had raised on the evidence, and to which having argued them, the opposite counsel had replied. The plaintiffs' counsel insisted that no question upon the evidence stood for judgment, the verdict having been rendered generally for the plaintiff without any point being reserved, and no motion for a new trial having been made within the first four days of Michaelmas term. A discussion then arose respecting an understanding alleged to have been entered into in Michaelmas term, which was relied upon as dispensing with the necessity for the ordinary motion for a new trial. The court upon this suspended giving judgment upon the demurrers till this term, to give time to clear this point up. And in this term, the affidavits of the plaintiffs and defendant's counsel were filed. For the part of the defendant, it was sworn that his counsel, within the time for moving for a new trial, applied to the plaintiffs' counsel to know if he would agree that the questions of law arising upon the evidence given at the trial might be argued and disposed of simultaneously with the demurrers, and so have the whole case decided at once; that he understood the plaintiffs' counsel to assent, and for this reason alone he did not move for a new trial. The plaintiffs' counsel answered this by saying that he was not conscious of having given any ground for supposing that he waived the necessity for moving for a new trial within the four days, and that the opposite counsel must have misunderstood him. Upon this the matter rested for the court to decide, whether the defendant's counsel might now move a rule nisi for a new trial on any exception he might raise on the evidence.

ROBINSON, C. J.—This cause was tried before me at Kingston. One thing is very certain: no point was reserved or intended to be reserved. Upon that point the record and my notes are consistent and explicit; the plaintiffs' counsel well understood that no point was reserved; the defendant's counsel, it seems, were under a different impression. I can only say I cannot account for that fact, for I was particularly explicit in declaring that I reserved no point, that I should charge the jury to find for the plaintiff upon the several promissory notes declared upon, and that it would of course be open to the defendant to move in banc any legal objection to the plaintiff's case which he could raise upon the evidence. This left it at the option of the defendant to move against the verdict in banc or not, as he might think proper, and left it also incumbent upon him to take care if he did move, that he moved in time. In the following term (Michaelmas), no motion was made for a new trial or against the verdict, in any shape. I recollect that during that term, upon some question arising between the counsel, my notes of the trial were referred to, and it was ascertained from them that the verdict was not taken subject to any points reserved. At what time in the term this reference was made I do not remember. My impression is, that the four days had expired, and that nothing passed in court (I mean in the hearing of the court) respecting the cause until after the first four days had passed; but I may be wrong in this impression. After the explanation, however, no motion against the verdict was made. In Hilary term, on the first Saturday, the demurrers came on to be argued, and the plaintiffs' counsel, as I gather from my term note, and my recollection does not vary from it, applied himself solely to the points presented by the pleadings. On the following Tuesday, the defendant's counsel was heard in answer, and he did certainly carry his arguments beyond the points raised by the demurrers. He adverted to the evidence given at the trial, which consisted almost wholly of admissions, and he reasoned upon that evidence, that the Montreal Bank being a foreign corporation, incorporated by a charter for specific

purposes, could not legally sue in this province upon a cause of action acquired here in a course of dealing not within the scope and object of their charter. The plaintiff's counsel, when he came to reply, objected that the defendant was too late to except to the verdict. I remember that he did urge this objection, and I noted his objection when he made it. He nevertheless did notice the arguments which the defendant's counsel had urged upon the verdict, and replied to them particularly and at some length—not thereby waiving, as I considered, the objection that the arguments were urged at too late a period, but taking the double course, which is not unfrequent, of denying that it was competent to the defendant to raise such objections, and denying at the same time that his objections were well founded, even if they could be properly entertained. These being the facts, I think it is to be considered that no rule is plainer, and perhaps none more inflexibly maintained in practice, than that where the verdict has not been taken subject to any points reserved, the party complaining of the verdict must move against it within the first four days of the next term. If the understanding which is asserted on the one side, were admitted on the other—or rather if it were not denied—that would take the case from the operation of the rule.

As the case stands I cannot doubt, and do not doubt for a moment, that the counsel for the defendant believed he had the assent he speaks of, but that the counsel for the plaintiff did not in fact give or intend to give any such assent. The usual effect of that is, we look upon the fact which is so denied not to be established, and that we do not give relief upon that ground. If we do so here, I conceive it would not be conceded as of right, but that we should be granting an indulgence. I do not consider the case one in which such an indulgence, or any indulgence, ought to be granted. When money is borrowed from any individual or association, with a perfect knowledge of all circumstances; and a note is given for the repayment of the loan, it may be permitted by *our law* to the borrower to turn round upon the lender and to plead as a defence

that he is *legally* disabled from enforcing the repayment—not because there was any imposition in the transaction, or because anything illegal or immoral is intended, but because the plaintiffs' right to sue in our courts may be resisted upon general principles of law. Such a defence I say may be tolerated *in law*, but it is not just, and I will afford it no facility. If I saw that the defendant, without any indulgence being extended to him, was in a situation to demand the judgment of the court as of right upon his objection, I should of course not hesitate to admit his right; but when I think it is not forced upon me, I decline going out of the ordinary line of proceeding to receive such an objection. The strongest ground in favor of the defendant's claim to be heard against the verdict, is the presumption, which I freely admit, that there has been a misunderstanding between the two counsel; but I think it right to consider that it was in the power of the defendant to have prevented the possibility of such a misunderstanding; and although, to meet the ends of justice, I would willingly give relief in such a case by relaxing from the strict rule of justice when we have the power to do so, I am not disposed to relax, when it is evident that the object desired to be attained by the relaxation, is clearly and wholly at variance with the justice of the case.

I believe my brothers are inclined, under all the circumstances, to consider and adjudge upon the objections raised on the evidence; and as it is most probable, therefore, that I take a less favorable view of the defendant's right than I might properly allow myself to take, it is fortunate that he will suffer nothing in consequence. So far as the questions involved are considered in themselves, they are most important and interesting, and they are of that peculiar nature, that when once they have been started, it highly concerns the community that they should be formally and finally settled with the least possible delay. Since therefore, it will be permitted to the defendant now to receive the judgment of the court upon these questions, it is to be regretted that he had not, by pleading, placed them upon record, in order that our judgment might have been reversed upon

appeal, if either party should desire it. My brothers are of opinion with me, that the defendant may be properly required to consent to the questions being stated in the form of a special verdict, and I trust the plaintiffs will concur in this.

SHERWOOD, J., expressed himself in favor of allowing the defendant to move for a new trial, and to have the judgment of the court upon any question which might arise upon the evidence adduced at the trial. He considered that the consent of the plaintiff's counsel to the course and arrangement suggested by the defendant's counsel, was implied from the course he pursued on the argument; and if the counsel did not expect that the court were to pronounce judgment upon that part of the case, there seemed little reason in his arguing it at full length, and therefore that the cause should take the same course as if the motion for a new trial had been made in due time. In pursuing this course, he did not feel that he was granting an indulgence; it was, in his opinion, under the circumstances of the case, a right which the court ought not in justice to withhold from him. He did not recognize a distinction between the law and justice of the case. If the law of the case were with the defendant, he was not prepared to say that the justice of the case was not with him. On the contrary, he thought the law of the case and the justice of the case usually went together. He desired however to hear another argument on the question, and fully concurred with the Chief Justice in the suggestion respecting a special verdict, in order that either party might appeal should he think it proper.

MACAULAY, J.—Under all the circumstances, I feel constrained to entertain and give consideration to the questions arising out of the evidence at *Nisi Prius*. In adopting this opinion, I do not consider that I am granting to the defendant any indulgence. If I so regarded it, I should withhold assent, having come to such resolution with hesitation and reluctance; for I cannot but concur in the sentiments just expressed by the Chief Justice touching the merits of the defence. The following are some of the reasons which

operate upon my mind on this occasion. We have had before us the pleadings upon demurrers, and they open to a certain extent, though not so largely as the evidence, the matters on which the defence is rested; and after the deliberate purpose evinced at *Nisi Prius*, and in the argument of the demurrers, it can hardly be supposed that the defendant was not earnestly bent upon adhering to any grounds of defence which the testimony received under the general issue might afford to him in addition to the pleadings of record. In turning to the proceedings at the trial, we find that a mass of correspondence and other papers were received by consent without proof, as embracing together with other facts, mutually agreed to and noted under such joint assent without having any witnesses, the circumstances under which the parties respectively hoped to sustain the issue. The documentary evidence was not looked into or read, and no legal points as arising out of it in combination with the *vivâ voce* admissions entered on the notes were suggested, but a verdict passed *sub silentio* for the plaintiffs for the full extent of their claim,—the Chief Justice noting that he reserved no point, but that of course it would be open to the defendant to move afterwards upon the evidence such legal objections as he might desire to urge. I do not understand that the contents of such note were distinctly communicated to the counsel at the time. It seems to me obvious, that although the plaintiffs by simply proving the promissory notes declared on, established in their evidence in chief a *prima facie* case, yet that without a perusal of the writings submitted by mutual consent, the Court of *Nisi Prius* could not have been understood on either side to have expressed any positive opinion as to the law of the whole case, including as it did matter of fact evidently not then known, and legal questions not propounded to the presiding judge, but rather that the consideration of the evidence and of its legal consequences was postponed. I should suppose the court could not feel at liberty to direct, nor the jury with propriety be asked or expected to render a verdict in the way it was taken without the express or implied assent of both parties;

and it is difficult to imagine that the defendant, after recording a variety of particulars upon the admission of the plaintiffs' counsel, and acquiescing in the course taken by the court, did not intend ulterior use of the evidence received, or that the plaintiffs' counsel did not perceive he meditated the discussion in term time of certain legal exceptions then in his contemplation, and that the causes went off as it did in the defendant's reliance upon a right reserved to him to raise them in some shape or other, however a difference might have prevailed as to the sense in which such reservation was taken, or the mode in which it was expected to be exercised. The defendant's conduct is not consistent or intelligible without attributing to him the intentions and designs he has avowed; and although the Chief Justice entered that he reserved no point, he added that it was of course open to him to moot any he might afterwards suggest, which (in the absence of anything specifically raised or overruled, with leave to move against such ruling), partakes as much of the character of a matter or case reserved, or of a special case upon the notes and documents, as of an ordinary adverse decision at *Nisi Prius*, with leave to move against it. Indeed, it is not clear to me that the nature of the proceeding does not import that the whole was necessarily reserved, or at least by implication, unless the contrary had been expressly declared. Strictly, the course pursued could not be said to form a special case, a point reserved, or a leave to move against the decision of the court upon an objection overruled; but perhaps it approaches as nearly to the last as either of the others, and in this light the Chief Justice viewed it. Nevertheless, the defendant asserts that he took the whole to form a reserved case, which the plaintiff's counsel (not being at liberty or disposed to concur in any arrangement out of the ordinary line) did not infer. Not having acquiesced in any such reservation however, the defendant might have erroneously presumed such acquiescence to have entered into the spirit of, and to have accompanied the concessions reciprocally made in the reception of the proofs and in eliciting the facts. The plaintiff's counsel

considered the verdict unconditional, subject only to question in the ordinary way within the first four days of the following term, upon a motion for a new trial ; but that this was mutually understood is not apparent, and is not to be necessarily inferred from the way in which the case went off. Although the Chief Justice conceived it was only open to the defendant so to move, he thought that as he had stated no points at the trial, he could in term raise whatever questions he desired to agitate, a privilege not usually allowed upon similar motions, especially when against the merits being generally confined to the exceptions taken at *Nisi Prius*. It seems no motion was made within the usual time within the ensuing term, but when the demurrer afterwards came on to be argued, the defendant claimed the right of turning to the evidence, and of arguing points not involved in the pleadings, but growing out of the testimony. This was objected to by the plaintiffs' counsel, yet the court did not peremptorily prevent further discussion, as they ought to have done were his objection doubtless well founded, but they heard out the argument notwithstanding, leading the defendant in all probability to suppose that his asserted claim to be fully heard was recognized. I do not consider that the plaintiffs' counsel compromised in any way the rights of his client by any answer he may have given to the defendant's arguments upon the evidence ; for he in the first instance protested against its admission, and when the court suffered the defendant to proceed, it became his duty to reply under the protest offered. It would be needless, in arguments and proceedings of this kind, for a counsel to make objections and afterwards to continue the discussion, saving the exceptions of his contending against the solidity of objections which he first insisted could not be entertained even if valid, was to be treated as a waiver of his protest. For my part, so much did I suppose that the court was to adjudge upon the whole matter, that in the ensuing vacation I sent to the crown office for the documents and perused the whole of them, and after looking into the grounds of demurrer I proceeded to note the inclination of

my mind at that time upon the only additional point of any importance which the facts in evidence seemed to present—namely, whether under the charter exhibited the plaintiffs could sustain this action upon the promissory notes specified in the declaration, the same having been made and endorsed in this province and transferred to the plaintiffs' agent in Kingston, who there discounted them in behalf of the plaintiffs with bank notes of theirs regularly executed in Lower Canada, but so disposed of in Upper Canada through their agent in the ordinary course of banking business—in other words, whether they could, through an agent here, carry on in their own names the business of bankers, and acquire a right of action in our courts against individuals accommodated with loans of their paper, advanced here upon negotiable securities executed and transferred to them within this province in the course of their business. When the Chief Justice was apprised of my impression, he thought I labored under a misapprehension, and I relinquished the idea as erroneous. Upon giving judgment last term in another case (similarly circumstanced) restricted to the demurrer, the right to go into the evidence was again contended, and since that period Mr. Draper, who was absent at the time of the argument in Hilary term and also in last term, but who was the plaintiff's counsel in Michaelmas term, has declared on oath how it happened that a motion, if essential, was not made in due course. I understand him to admit that he was aware of the necessity for moving unless dispensed with, although I inferred from what the defendant has said, that he himself imagined the evidence reserved. Mr. Sullivan explains his view and understanding of the case in a counter affidavit. From these affidavits it is manifest that the defendant's counsel did not from forgetfulness or oversight omit moving, but that he only abstained from so doing in the supposition that it was rendered unnecessary, and that what would have been had as of course for the asking was granted by the other side without exacting that ceremony. There was no obstacle or impediment in the defendant's way, and although I am

surprised that such important business should in such a case not be conducted with the strictest regularity, or be placed beyond mistake by written undertakings if any matters of form were agreed to be dispensed with. I at the same time cannot but perceive how it came that no motion was offered. If not a reserved case, it was thought the plaintiffs' counsel so consented to regard it on the argument, the points of law intended to be submitted to the court being doubtless well known. Mr. Bidwell, the plaintiffs' counsel at *Nisi Prius*, was not present in Michaelmas term, and Mr. Sullivan may not have been impressed as strongly as he supposed or might have desired with the motives and the cautious reserve with which he had acted at the trial, and might not therefore have rejected the overtures made by Mr. Draper on the defendant's part as decidedly and peremptorily as Mr. Bidwell would himself have done. It is only in this way that I am enabled satisfactorily to reconcile the affidavits of those gentlemen. And unless Mr. Sullivan was explicit, I can readily imagine Mr. Draper's conceiving there was no objection in this cause to what would readily be yielded in most others under like circumstances, touching a step formal rather than substantial. We are all well aware how frequently matters are before the court by consent of parties, out of the strict routine of practice. I lament always that room should be left for the possibility of misapprehension; but we do find that misunderstandings occasionally occur, causing to the court needless embarrassment, and to myself, I would add, at times much anxiety; but when they present themselves the court must extricate itself, and deal with the difficulties as they seem best to deserve. Looking at the present in all its bearings, I feel that in the exercise of a sound discretion—which though a discretion must be exercised judicially and not arbitrarily—the best judgment I can form impels me to allow the defendant's claim to rest upon the evidence as well as the demurrers. I regard it in the nature of a right, of which my best discretion dictates the concession. I grant the claim on no other grounds and in no other spirit; for

having perused the evidence, I am in possession of the information requisite to judge of the merits; and as already intimated, I do not consider the defence meritorious, though it may eventually prove to be legal. Whether legal or not may involve an important question, touching which I have formed no fixed opinion, and which I shall be glad to have again argued. The subject will therefore be further discussed, either upon a special verdict (to which the defendant's consent is exacted, should the plaintiffs desire to place the facts in that shape on the record), or upon a motion for a new trial to be now made, upon points of law to be now mentioned, in order to facilitate the future argument, and in order to prevent, if possible, any mistake or disappointment touching practical points hereafter.

The defendant's counsel expressed their readiness to reduce the case to the shape of a special verdict, but the plaintiffs' counsel declined this; whereupon *Draper* moved for a rule nisi for a new trial, on the grounds that a foreign corporation cannot conduct business in this province, and cannot sue on a contract made out of the country where they are incorporated; that a foreign corporation cannot sue at all in this province; that the plaintiffs came within the provisions of the statute 6 George I. or 14 George II., in their inception as a corporation, or when they commenced business in this province—usury—and for misdirection, because on the evidence the Chief Justice should have directed a verdict for the defendant.

Per Cur. (diss. Chief Justice)—Rule nisi granted.

REGULÆ GENERALES.

It is Ordered, That in future rules nisi for referring to the Master to compute principal and interest, and to tax the costs after judgment by default upon promissory notes, or in other actions in which a reference may be made to the Master for the same purpose, may, if the plaintiff shall desire it, be made returnable at the expiration of such number of days after the day of service, as shall be expressed in such rule; and that the practice be the same in this respect upon a judge's summons for the same purpose.

And it is further Ordered, That upon the rule being made absolute, or upon the granting of a judge's order in any such case, the plaintiff may proceed to tax his costs and enter up his judgment without service of such rule or order or of any notice ; and that the rule nisi, or judge's summons, shall be so drawn up as to apprize the defendant that judgment will be entered without further notice, unless cause be shown to the contrary.

In this term, WILLIAM A. FORWARD, Esq., was called to the bar and sworn in.

J. B. ROBINSON, C. J.
J. MACAULAY, J.

KING'S BENCH.

MICHAELMAS TERM, 6 WILLIAM IV.

DOE EX DEM. WILCOX V. THORNE.

Where A. being seized in fee of lands, sold a portion of it to B. but gave him no deed, and B. went into possession, and A. afterwards sold all the land to C. directing that a deed should be made to B. of his portion, when he paid for it in full, and C. sold all to D. except B.'s portion, which D. subsequently bought at sheriff's sale, where it was sold for B.'s debt, and C. then made a deed of B.'s portion to a stranger for a nominal consideration: Held, that such deed was fraudulent as well against D. as against creditors.

Ejectment for half an acre in the township of Markham. The following facts appeared at the trial at the last assizes for the Home District: Lyons being seized in fee of ninety-five acres, of which the half-acre in question formed part, conveyed the whole tract to Ezekiel Benson in 1819. He had before that sold several small parcels of the ninety-five acres to different persons, but had not made titles, probably because the purchasers had not made their payments. This half-acre he had sold to one Vansickle, who assigned to Burkholder, and he to Hoel Wilcox, who built upon it and was in possession 17 or 18 years ago. At the time of the sale, Lyons took a bond from Benson to convey to the several persons to whom he had made sales. Hoel Wilcox

being indebted, no title was ever made to him, in order that it might be saved from the executions of his creditors. In 1820 Benson conveyed to Thorne 84½ acres, by a deed not embracing the half-acre. In December 1829, a judgment was entered in a case of *Small v. Hoel Wilcox*, upon which execution issued against lands, and the half-acre in question was sold by the sheriff in July 1831 to the defendant Thorne, as the highest bidder, and conveyed to him by sheriff's deed in August 1831.

Thorne brought ejectment on this deed against Hoel Wilcox, who continued in possession, and recovered judgment in February 1833, upon which *hab. fac. pos.* issued, and Thorne received possession in March 1833. Thorne suffered Wilcox to continue in possession some time, taking his undertaking to pay rent weekly. In May 1833, Ezekiel Benson, who had never been in possession of this half-acre, and who had not for fifteen years past been in possession of any part of the ninety-five acres purchased by him, made a deed for a nominal consideration of 10*l.* to the lessor of the plaintiff, who is a son of Hoel Wilcox. No consideration was shewn to have been paid by Jonathan D. Wilcox, the plaintiff's lessor. Hoel Wilcox is still living. The jury found a verdict for the defendant.

Counsel for the plaintiff raised several objections in point of law to this verdict, to which *Small* replied; but the opinion of the court was not given specifically upon them.

ROBINSON, C. J.—This deed from Benson to the lessor of the plaintiff, is on the face of it a mere contrivance to overreach the title of Thorne under the sheriff's deed. Benson was bound to convey, if at all, to Hoel Wilcox; and though out of possession, his release to him would have been good, or to his assignee, or rather to the purchaser claiming under him. Instead of that, however, he makes a voluntary conveyance to Jonathan D. Wilcox, for the purpose, as may be fairly inferred, of giving him a legal title, in fraud of Thorne, the purchaser of Hoel Wilcox's interest. I think the jury were fully warranted by the evidence in giving the verdict they did, and that indeed they could not reasonably have found any other. This bargain and sale,

under which the lessor of the plaintiff makes title, was given, it is to be observed, by Benson, who never had been in possession of the premises, and while another person was in actual possession who had held for more than fifteen years under an independent title. I think the evidence brought this conveyance within the 27 Elizabeth, c. 4, s. 3. It was shewn to be a conveyance made for the intent and of purpose to defraud and deceive a person who had purchased the same lands. It was moreover void, under statute 13 Elizabeth, as being intended to defeat a creditor. It was fraudulent and void also at common law.

SHERWOOD, J., and MACAULAY, J., of the same opinion.

Per Cur.—Postea to the defendant.

WRAGG V. JARVIS, SHERIFF.

Where a sheriff refuses to produce a prisoner in his custody, twenty-four hours after notice, it is an escape. And where, in debt for an escape on a *capias ad satisfaciendum*, the sheriff pleaded that he gave the prisoner the benefit of the limits, and that he never left them, &c., and the plaintiff replied that he did leave them: Held, that the plaintiff shewed an escape under this issue, by proving that after the prisoner was admitted to the limits, she was remanded back to custody, that the order remanding her was delivered to the sheriff, and that he received due notice to produce her body, but failed in doing so.

Debt for the escape of one Anne Devlin, a prisoner in execution. Pleas: 1st. *Nil debet*. 2nd. That defendant permitted the said A. D. to go and remain upon the limits of the gaol of the Home District, and that she hath never departed therefrom, but still is and remains upon the said limits, under and by virtue of the said writ mentioned in the declaration—without this that defendant ever did since her arrest permit or suffer her to escape or go at large out of his custody, or that the said A. D. ever did, since her arrest, escape or go at large out of the custody of defendant, otherwise or further than defendant has set forth in this plea. Replication, that defendant being sheriff as aforesaid, without the leave and license, and against the will of plaintiff, did suffer and permit the said A. D. to escape and go at large wheresoever she would out of the custody of defendant, and in manner and form as in the declaration alleged. Demurrer to the replication.

The parties went to trial on the issue of *nil debet*, and the

following case was stated for the opinion of the court—a verdict subject thereto being taken by consent for the plaintiff for 48*l.* 9*s.* 3*d.*

The plaintiff, on the 25th April 1834, recovered in his Majesty's District Court for the Home District, against Anne Devlin, executrix of Christopher Devlin, deceased, a judgment for 44*l.* 3*s.* 3*d.* damages and costs. After this recovery, on the 5th May 1834, a *ca. sa.* was sued out, returnable the 16th June then next, and delivered to the defendant to be executed; by virtue of which he duly arrested A. D. and had her a close prisoner in the gaol of the Home District. After this arrest, and while A. D. was in close custody, and before the return of the *ca. sa.*, the defendant took a bond from certain persons as security for the gaol limits, and allowed A. D. to go upon the limits. On the return day of the *ca. sa.*, the sheriff returned in due form of law that he had taken the said A. D., &c. After this return, the plaintiff, for the discovering of the effects of the said A. D., and while she was on the limits, filed interrogatories for her to answer on oath, and served her with a copy. She did not within twenty days from such service put in any answer, whereupon the judge of the District Court, on the 11th of August 1834, made an order forthwith recommitting the said A. D. to the gaol, a copy of which was the same day served on the defendant, but he did not then, nor at any time subsequent, recommit the said A. D. to gaol. On the 26th of August 1834, a notice, of which the following is a copy, was served upon the sheriff.

In the Home District Court:

Between THOMAS B. WRAGG, plaintiff, and ANN DEVLIN, executrix of the last will, &c., defendant.

I do hereby give you notice, and require you to procure the body of the above named defendant to-morrow, at 12 o'clock at noon, pursuant to the statute in such case made and provided.

Dated this 26th August, 1834.

(Signed) S. W. Pltfs. Atty.

To W. B. Jarvis, Sheriff Home District.

On the next day, at noon, the plaintiff's attorney personally demanded of the said defendant, as such sheriff, at his office in the Court House of the said district, a sight of

the said Anne Devlin, and was answered that she was not there. Immediately after this demand on the defendant, the plaintiff's attorney demanded of the gaoler of the Home District in his gaol, a view of the said Anne Devlin, and was also answered that she was not in the said gaol. Since A. D. was allowed to go upon the limits by the defendant, she has not been in close custody at the suit of the plaintiff. The defendant used due diligence to take A. D. after the delivery of the judge's order, but did not succeed; but whether in fact she did at any time depart from the limits was not shewn. The question was, whether the above facts supported the plaintiff's case for an escape against the defendant on the issue joined; if the court were of that opinion, then the verdict for the plaintiff to stand—if not, then a nonsuit to be entered.

The demurrer was argued by *Sullivan* for the defendant, and the special case by *Baldwin* for the defendant. *Washburn* argued for the plaintiffs.

ROBINSON, C. J.—The plea distinctly traverses the escape. It avers that the debtor was admitted to the limits, and *has always remained upon them in the custody of the defendant* upon this execution, and it denies that the defendant ever permitted her to escape, or *that she ever did escape*. There is no general issue, properly speaking, in an action of this kind. If there were, this plea would certainly amount to it. But the replication, it seems to me, is as positive and distinct a denial of the plea as the plea is of the declaration; although it is true that it is but a re-affirmance of the escape as set out in the count. When the defendant pleads the admission to the limits and that A. D. never departed from them, but always remained in defendant's custody, it distinctly denies the escape; and when therefore the plaintiff in answer to this, affirms that A. D. did escape out of the custody of the sheriff and go whithersoever she would, he as distinctly denies the plea. Both assertions cannot by possibility stand together, and the parties are clearly at issue upon the fact most material to the action. Nor do I see that upon special demurrer there would have been any ground for holding the replication bad. The replication of

de injuria and *absque tali causâ* does not appear to be usual or proper in an action of this kind under any circumstances, and could not I think be held necessary here in point of form, because I consider that the effect of the limits being assigned to the gaol by a public act which we must judicially notice, is to make them in fact part of the gaol as respects civil prisoners.

I am of opinion that upon the demurrer the plaintiff should have judgment.

To decide the question arising upon the special case, we must consider our statutes 11 Geo. IV. c. 3, and the British statute 8 & 9 W. III. c. 27, s. 8.

If I am to understand from this case that the facts admitted stood uncontradicted, then I am of opinion "*that they do support the plaintiff's case against the defendant for an escape on the issue joined ;*" for I conceive that when the sheriff is legally called upon by an order of a court to recommit to close custody a prisoner whom he has admitted upon the limits, his failure to do so, and his declaration that he cannot find the prisoner, do support the plaintiff's case for escape. If it be meant to refer to the court for an opinion whether those facts establish the case *uncontrovertibly*, so that the plaintiff's case was incapable of being repelled at the trial by proving that though the sheriff could not find the prisoner upon the limits, she was nevertheless all the time there,—that is a different question ; and it is this latter question which I suppose from the admissions in argument is intended to be submitted to us. Upon this point I think we cannot hold otherwise than that, after a debtor has under the 10th section of our statute been deprived by an order of court of the benefit of the limits, his continuance upon them, after the sheriff has had reasonable notice of the order, is as much an escape as if there were no limits beyond the walls of the gaol, and that it becomes immaterial consequently whether the prisoner was in fact within or without the limits after the period when the sheriff ought to have had him in close custody. It is not necessary, in my view of the case, to consider what is the fair construction of the 8 & 9 Wm. III. c. 17, and its

application to this case ; but I do not see how it can be doubted that that provision is in force here, and that the sheriff—especially when the prisoner was no longer entitled to the benefit of the limits—was bound to produce her in twenty-four hours, as in England ; and his failure to do so must, I consider, be looked upon as in substance a refusal, and must under the statute render him liable to an action for her escape.

SHERWOOD, J., and MACAULAY, J., concurred.

Per Cur.—Judgment for plaintiff on the demurrer, and *postea* to the plaintiff.

ELMORE V. COLMAN.

Where a cause is referred to arbitration by order of *Nisi Prius* and the arbitrators award a sum within the jurisdiction of the District Court, the court or a judge may grant an order for full costs under the ninth general rule of Easter term, 11 Geo. IV.

In this case, which was tried before Mr. Justice Sherwood, on the Eastern circuit, a verdict was taken by consent for 60*l.*, subject to a reference, the costs to be in the discretion of the arbitrators. They awarded a sum less than 40*l.* to be paid by the defendant, with the costs of the suit. The judge declined certifying at the trial in order to entitle the plaintiff to King's Bench costs under the provincial statute of 1818, because he had not tried the cause, and could not therefore declare an opinion upon the propriety of instituting the suit in the Court of King's Bench. The plaintiff now moved under the rule of court in Easter term, 11 Geo. IV., for an order to the Master to tax King's Bench costs.

ROBINSON, C. J.—In my opinion, we may properly grant this order. The case comes, I think, within the scope and spirit of our rule, and we are not restrained by the statute 58 George III. c. 4, from making such an order. The legislature surely meant to use the word *trial* in such a sense as to include the *hearing* of the cause ; and when the cause has not in fact been *tried* by the court in that sense, but has been heard and determined by arbitrators and a verdict taken as a merely formal proceeding, there is the same reason as in any other case under our rule for hearing

the facts upon affidavit in order to do justice between the parties; for it can no otherwise be known whether the cause was really of the proper competence of the District Court.

SHERWOOD, J., and MACAULAY, J., (upon the authority of a case in this court formerly decided), concurred; and as upon the affidavits the case appeared to be beyond the jurisdiction of the District Court, they made the rule absolute.—See *Brown v. Smith*, 7th January 1831; and *Harley v. Heron*, administrator of Longsdon, Easter 2nd Geo. IV.; and *Powell v. Johnson*, in Chambers, 29th July 1839.

DAVIS v. DAVIS.

Where there is an issue in fact and an issue in law, on which contingent damages are to be assessed, a notice of trial was held sufficient to enable the plaintiff to try the issue and assess damages.

There was an issue in fact joined in this cause, and also an issue in law upon demurrer. The plaintiff made up his record, setting out a *venire* to try the issue in fact, and to assess contingent damages on the demurrer, and served a common notice of trial. The defendant did not appear at the trial, but during this term moved to set aside the verdict and assessment, on the ground that the notice was irregular.

E. C. Campbell, for plaintiff. *James Boulton*, for defendant.

Per Cur.—We think this notice sufficient, because defendant could not have been misled; and it is the award of the court, that the contingent damages shall be assessed by the same jury that try the issue; the defendant, when prepared for the one must be equally so for the other.

Per Cur.—Rule refused.

WASHBURN, ONE & C., v. WALSH.

A bailable *ca. re.* sued out by an attorney in person, must be endorsed with a notice to the defendant of the sum claimed and costs.

Draper moved to set aside the arrest in this cause for irregularity. The writ was sued out by the plaintiff in person, and endorsed “Bail for 75*l.* S. W. in person.”

But there was no notice of the amount claimed for debt and costs. *Washburn* shewed cause.

Per Cur.—There is no doubt this rule must be made absolute. The case comes within the rule of court of Trinity term, 3 & 4. Will. IV.

Per Cur.—Rule absolute.

ALLANSON, ADMR. OF ALLANSON V. JOHNSON.

An interlocutory judgment, in which the cause is not properly styled, is insufficient to sustain a notice of assessment, and in such a case it is not necessary to give a notice of an intention to move to set aside the proceedings, before assessment of damages, but if it be not given, the proceedings will be set aside without costs.

Interlocutory judgment was signed in this cause on the 15th September, 1835, but the papers were all made up and entitled in a cause of Allanson v. Johnson Admr. &c., of Allanson. Notice of intention to move to set aside proceedings, was not given till after the commission day of the assizes. Damages were assessed. The defendant moved for this defect, and also on affidavits of merit, and accounting for his apparent neglect in defending himself.

The court set aside the interlocutory judgment, notwithstanding the want of notice before the commission day, considering it wholly insufficient to warrant the assessment of damages, but as due notice of intention to move had not been given, they made the

Rule absolute without costs.

MORVEY V. MAYNARD.

A special jury cannot be struck after the commission day of the assizes. It is no objection that the sheriff has not summoned all the 16 special jurors, if enough attend to try the cause.

Quære—If a venire and distringas should not issue for a special jury.

The defendant served the plaintiff with notice to attend, and strike a special jury for the trial of this cause, four days after the commission day of the assizes for the Johnstown District. The plaintiff did not attend, but the defendant did, and the jury was struck. The sheriff had not time to summon more than fourteen out of the sixteen special jurors. When the cause came up in its order, it was tried

by a common jury—the defendant objecting to this jury—but making a defence subject to the objection:—Verdict for plaintiff.

In this term *Sherwood, H.* renewed his objection and obtained a rule nisi to set aside the verdict. *Bogert* shewed cause.

ROBINSON, C. J.—I think this cause rightly tried by a common jury. Upon our statute 48 Geo. III. ch. 13, sec. 5, it is clear a special jury must be struck before the assizes. Besides, it is to be observed, that there is no *venire* here and no *distringas*; and although the *venire* is, by our statute, waived in regard to common juries, I do not see clearly that the necessity for jury process is dispensed with, when a special jury is to be summoned. It is upon the first ground however, that we hold the trial by a common jury to have been warranted in this case.

In respect to the objection, that two out of the sixteen jurors, were not summoned by the sheriff: if the case had rested upon that alone, the case of *Rex v. Hunt*, 4 B. & A. 430, is an express authority to show that the special jury might nevertheless have tried the cause.

Per Cur.—Rule discharged.

BANK OF UPPER CANADA V. COVERT AND BOULTON.

Where a cause was put to the foot of the docket with the consent of the defendants' attorney, and remained untried for want of time: the court refused judgment as in case of non-suit, or the costs of the day to defendant, considering that the plaintiff had been guilty of no laches.

In the early part of the last assizes, this cause was, on application of the plaintiffs' counsel, put at the foot of the docket, with the consent of the defendants' counsel. It could not afterwards be tried, but remained with a number of other causes when the assizes terminated, undisposed of. During the assizes the plaintiffs' counsel was ready and desirous of proceeding to trial, but could not obtain leave to take the case out of the order in which it had been placed on the docket.

Bethune during the term obtained a rule nisi for judgment as in case of nonsuit, for not going to trial pursuant

to notice, or for the costs of the day. *Gamble* shewed cause.

Per Cur.—The plaintiff does not appear to have been guilty of any laches. The cause was untried for want of time. We think, therefore, the defendant is not entitled to judgment as in case of nonsuit, or to costs.

Per Cur.—Rule discharged.

SPAFFORD V. BUCHANAN.

Where the plaintiff's attorney sent notice of countermand of trial to his agent in town, but it arrived too late for service, and the defendant's witnesses attended for the trial: Held that the expense of such witnesses was rightly allowed in the costs of the day.

Notice of trial was given in this cause before last Trinity term. The plaintiff's attorney, residing at Brockville, sent up a notice of countermand to his agent at Toronto about a week or ten days before the last assizes for the Home District, but by some accident it did not arrive in time for service. The defendant's attorney was apprised of this only the day before the assizes commenced. He had, in the mean time, issued subpœnas and enclosed them to a professional gentleman at Brockville to have served. The plaintiff's attorney informed the gentleman that the cause was not coming on, and requested him not to send up the witnesses, but he declined assuming any responsibility, and in accordance with his instructions, sent up the witnesses at a heavy expense. On the day before the assizes the plaintiff's agent in Toronto, was applied to by the defendant's attorney, to know whether he would undertake the cause should not come on, which he declined. As soon as the defendant's attorney found the record was not entered, he took measures to countermand the witnesses, but was too late.

Draper during this term obtained a rule nisi for judgment, as in case of nonsuit, which was discharged by *Bogert*, on the peremptory undertaking and payment of costs. The master, on the taxation of the costs, allowed the full costs of the witnesses and serving subpœnas. *Bogert* now moved to revise the taxation and disallow the expense of serving the subpœnas, and the monies paid the witnesses: contending, that as the party employed by the defendant's attorney

to have the subpoenas served had notice that the cause was not to be tried, and that the witnesses would not be required, the plaintiff should not be put to the expense of these witnesses, who went up to Toronto after this notice.

Draper shewed cause.

Per Cur.—The circumstances do not, in our opinion, warrant the application. It is true the plaintiff did all he could, after he had resolved not to go to trial, to exempt himself from these costs; that is all he could do after the accident, which seems to have befallen his countermand of notice; but some one must pay the witnesses—the expense is great—neither the defendant nor his attorney acted vexatiously, nor were they in any fault. Notice given to a third person, not authorised to decide, and naturally unwilling to assume responsibility, cannot suffice.

Per Cur.—Rule discharged.

SPAFFORD V. BUCHANAN AND MALLOCH.

Where there are two defendants, judgment, as in case of nonsuit for not going to trial pursuant to notice, will not be granted to one defendant.

Notice of trial in this cause was served on the attorney for the first defendant, and on the second defendant, who had appeared and defended in person. The plaintiff served a notice of countermand on the defendant Malloch, but by accident the notice of countermand, intended for Buchanan's attorney, miscarried. The cause was not entered for trial.

Draper obtained a rule nisi this term on behalf of the defendant Buchanan, for judgment as in case of nonsuit. *Bogert* shewed cause. Cases cited:—4 T. R. 520: 4 B. & C. 260: 2 H. Bl. 280: 2 Say. 22: 1 Burr. 358: Cowp. 485: 3 T. R. 662: Hullock on Costs, 402.

Per Cur.—There cannot be judgment as in case of nonsuit, at the prayer of one of several defendants; they must all join. In this case, the defendant Buchanan should have his costs for not proceeding to trial pursuant to notice, but the rule for judgment as in case of nonsuit, should be discharged. As to the costs of this application—the costs

of this argument should not be allowed, because probably, the plaintiff would have readily assented to pay the costs of the day, if the application had been confined to that.

Rule for judgment, as in case &c., discharged, but rule for costs of the day made absolute.

DIXON V. PAUL AND OTHERS.

Part failure of consideration, is no defence to an action on a promissory note.

Assumpsit on a promissory note. Plea, non assumpsit. At the trial it appeared that the note was given in part payment for $\frac{1}{2}$ an acre of land, and certain buildings thereon; another note, not yet due, for a larger sum, was also given. After the defendants had been put in possession of the land, they had it surveyed, and found that the building, instead of being upon that part of the plaintiff's property sold to defendants, it was owned by another person, to whom defendants paid 50*l.*, and obtained a title from him, and this action was defended on the ground of failure of consideration; but the jury, under the direction of the Chief Justice, found for the plaintiff.

Draper obtained a rule nisi to set aside this verdict, and enter a nonsuit, producing an affidavit that the second note had been negotiated by the plaintiff, so that defendant's would be compelled to pay the full amount of the price of the land, though they had been forced to buy it over again from another person.

Washburn shewed cause, and filed an affidavit, by which it appeared that defendants had taken a bond to secure a title at the time the notes were given.

Per Cur.—We think the verdict should stand. There was a substantial consideration for the note, and if the plaintiff could not sustain this action, he would have parted with a valuable consideration for nothing, and the defendants would have unjustly profited by his labour. Defendants have had possession, and the parties therefore cannot be put in *statu quo*. Securities for title also seem to have been taken, on which defendants may sue, and recover such damages as they may have sustained.

Per Cur.—Rule discharged.

DOE EX DEM CRAWFORD V. COBBLEDIKE.

Where an ejectment notice to produce a crown lease, under which the lessor of the plaintiff claimed, had been given, and the lease was not produced, but an exemplification of it was put in, and the defendant gave parol testimony that the lease had been assigned to a third party, who had given a mortgage on it to the lessor, which had been paid at the day, and the jury found for the defendant: *Held*, that the evidence that the lessor had parted with his interest was sufficient to support the verdict.

Ejectment for No. 2, 1st con. of Pickering. The lessor of the plaintiff proved title, by shewing a lease of the premises to himself by letters patent, dated 1st October, 1817, to hold for 21 years, the lot being a clergy reserve. The original patent was not produced, but instead of it an exemplification under the great seal. The defendant produced evidence to shew that the lessor of the plaintiff had divested himself of the estate, which he held as lessee of the crown. The dispute at the trial seemed to be confined to the southerly half of the lot, which the defendant endeavored to prove had been assigned to one Ray, in several pieces of 50 acres each. Ray was not shewn to have transferred to the defendant, nor was that necessary. It was alleged that Cobble-dike was put in possession by him, but it was immaterial whether that was the fact or not. After the evidence was closed, the learned judge left it to the jury to find whether the lessor of the plaintiff had parted with the estate conveyed to him by the crown, in which case the verdict went necessarily for the defendant. The jury limiting their enquiry, as it seems, to the southerly half of the lot, found that he had assigned it, and that he had subsequently taken a mortgage on the same land from Ray, to secure a sum of money lent, and that the money due upon the mortgage was tendered on the day, and refused, upon which finding, they declared their verdict to be for the defendant, being instructed by the learned judge that such ought to be the effect of their finding the above facts proved to their satisfaction.

The *Solicitor General* and *Small* obtained a rule nisi to set aside this verdict, on the ground that it was unsupported by legal evidence. *Baldwin* shewed cause.

ROBINSON, C. J.—In respect to the north easterly quarter of the lot, I cannot see that any legal evidence was given to shew that Crawford had parted with his estate in it; unless therefore, we are to understand, that the case, as to

those fifty acres, had been given up, there can be no doubt that the plaintiff is entitled to a verdict. The transfer of the whole northerly half of the lot, however, seems to have been spoken of upon the trial as being known and undisputed; and, as no evidence was brought to prove the contrary, nor any objection taken in regard to the evidence given of those transfers, it was probably intended only to litigate the right to the southerly hundred acres. In respect to that part of the lot, I am satisfied that the evidence was sufficient to warrant the jury in finding the possessory right to be in Ray; and, as I understand the question is to be confined to the correctness of the verdict in this respect, my opinion is, that the verdict for the defendant should stand. Notice was shewn to have been given to Crawford to produce the original lease—it was not produced, perhaps he had it not—it was not shewn that he had. Assignments of crown leases, we know, are commonly made by endorsement upon the patent, and when the patent cannot be produced, it will seldom be found possible to give the best legal evidence of the transfers, when there have been several, as seems to have been the case with respect to this lot. But, in my opinion, the evidence which was given was sufficient to entitle the jury to say, that Crawford, long after the issuing of the patent to himself, acknowledged Ray to be rightfully possessed of the hundred acres, by taking from him a written security or mortgage upon them; and as the jury found, further, that that mortgage was extinguished by a legal tender at the day, it follows that the interest which Crawford admitted to be vested in Ray must be regarded as existing in the same manner as before the mortgage. The evidence of three of the witnesses is enough, I think, to satisfy the jury that if Ray paid the money, (which he is shewn to have tendered within the period), he was to be restored to the possession of the improvements he had made on this hundred acres—or, in other words, was to regain possession of the possessory right, of which Crawford had accepted a conditional assignment. The secondary evidence was admissible under the circumstances shewn, and it was sufficient, I think, to warrant the conclusion which

the jury came to. As the paper spoken of by the witnesses is sworn to have come to the possession of Crawford, its contents must be taken from the memory of the witnesses who drew it and certified it; and their testimony, I think, warrants the belief that Crawford recognized Ray's right to the possession of these premises: if the paper would have led to any other conclusion, Crawford might have produced it. We are of opinion the verdict rendered for the defendant must stand.

Per Cur.—Rule discharged.

BANK OF UPPER CANADA V. BETHUNE ET AL.

Where a cause came on to be tried in its turn, and the plaintiff not being ready the defendant consented that it should be put at the foot of the docket, and it could not afterwards be tried for want of time, a rule for judgment as in case of a nonsuit was refused.

Bethune obtained a rule nisi in this cause for judgment, as in case of a nonsuit, for not going to trial pursuant to notice. *Gamble* shewed cause, and produced an affidavit shewing that in consequence of a notice served by the defendants three or four days before the assizes, calling upon the plaintiffs to produce certain papers, and to prove the consideration of certain deeds in the plaintiff's possession, the evidence of one Mosely was necessary, who was then at Penetanguishene; that on account of his not having returned when the cause was called on, the record was placed at the foot of the docket, with the assent of plaintiff's attorney; and that two days after Mosely came, and plaintiffs were ready for trial, and attempted to try the cause, but the assizes were ended before it could be taken.

Per Cur.—The rule, under these circumstances, ought not to have been moved, and must be discharged.

DOE EX DEM. MILBURNE V. SIBBALD.

The court will interfere by setting aside a judgment in ejectment and *hab. fac. pos.* executed upon a mortgage, in favour of an innocent purchaser for valuable consideration, without notice, so as to afford him an opportunity of redeeming the mortgage, under the statute 7 George II., on payment of costs.

One Edgar had purchased the premises in question from Sibbald, the defendant, in January 1835, not knowing that

Sibbald had previously mortgaged them to Milburne. Milburne afterwards brought ejectment on his mortgage, and served Sibbald with the declaration, instead of serving the tenant whom Edgar had put into possession. Sibbald let judgment go by default, and *hab. fac. pos.* was issued, under which Edgar's tenant was ejected. Edgar heard nothing of this until three weeks before the 26th of June last, when *Ridout* moved the court in Trinity to redeem, under the 7th George II. chapter 20, and got a rule, returnable at Chambers. The judge at Chambers refused the rule, as the action of ejectment was no longer pending, and referred him to the court this term to apply to set aside the judgment and restore the possession, with a view to make a new application to redeem; and now, after hearing *Ridout* in support of the application, and *Baldwin* against it, the court made the

Rule absolute, on payment of costs.

BROWN V. BETHUNE.

Where plaintiff sued out a bailable *ca. re.* against defendant, and before its return took a cognovit from defendant without using the *ca. re.* at all, and subsequently entered judgment, entering common bail for defendant, and without any affidavit of debt other than that on which the *ca. re.* issued, which was for 1,500*l.*, charged him in execution on a *ca. sa.* for 2,500*l.*; the court set aside the arrest and *ca. sa.* with costs.

An affidavit of debt was filed in this cause on the 11th of May last; debt sworn to, 1,500*l.*; and *ca. re.* issued thereon, returnable the first of Trinity term last. On the 19th of May, defendant signed a cognovit confessing a debt of 2,500*l.* On the 26th May, plaintiff filed common bail for defendant, entered judgment, and sued out a *ca. sa.* returnable the first of Trinity term, without any other affidavit being filed than the one on which the *ca. re.* issued, which last-mentioned writ never was placed in the sheriff's hands.

Bethune obtained a rule nisi this term to set aside the *ca. sa.* for irregularity, and discharge defendant from custody. *Washburn* shewed cause, and produced affidavits that since this motion was made—4th November—defendant offered to pay him 300*l.*, provided he would discharge him from custody, and promised to pay him the remainder;

that his reason for not using the *ca. re.* was, that defendant had made an offer of coming to a settlement, and plaintiff feared he would not settle amicably if he should arrest him ; but he had no design of abandoning the process. And two questions were made—1st, was the *ca. sa.* irregularly issued ? 2nd, did the delay cure the irregularity ?

Per Cur.—The plaintiff was not warranted in suing out a *ca. sa.* upon the affidavit made in the first instance, as his subsequent proceedings shewed that he had abandoned the bailable process ; and we have no ground in such a case for inferring that his apprehension respecting the defendant's leaving the province continued, since he declined to proceed upon it by exacting bail.

Rule absolute, with costs.

McMARTIN, ONE, &C., v. SPAFFORD.

Where an attorney served his bill of costs on the 20th May, and the *placita* on the Nisi Prius record were entitled of Trinity term, which commenced on the 16th of June, not a lunar month after such service, but a memorandum was added—to wit, 11th July—and the plaintiff proved that his declaration was filed that day, but did not produce the writ: *Held* sufficient to entitle him to a verdict, and that if the writ were issued too soon, the defendant should shew it.

This action was brought to recover the amount of several bills of costs. At the trial, the plaintiff proved that he served copies of his bills on the 20th of May, 1834, not a lunar month before the first day of Trinity term in that year. The record commenced with *placita* of Trinity term, 1834, concluding with S.S. 10th July, 1834, which was a day in vacation, after Trinity term. Plaintiff further proved at the trial that his declaration was filed on the 10th of July, but no evidence was given to shew when process was sued out. The defendant objected that sufficient evidence was not given of the service of the bill *one month* before action brought. Verdict for plaintiff, subject to the opinion of the court whether under these circumstances he was entitled to recover.

The point was argued by *Sherwood* for the plaintiff, and *Bogert* for the defendant.

ROBINSON, C. J.—With reference to the statute 2 Geo. II. chapter 23, the suing out of the writ, and not the filing

declaration, is to be treated as the commencement of the action—that is clearly so held. The record here does not contain what is properly called a special memorandum, being made up as records are in the Common Pleas and as in the King's Bench, when the proceedings are by original. The first *placita* may be supposed to state the term in which declaration is filed, or it seems that it may properly in this case be entered as of the term in which issue is joined, and this is the usual course with us. The first question here is, can the mere addition of the words “to wit, the 10th day of July, 1834,” be looked upon as equivalent to a special memorandum? It merely specifies as a day in term that which we know to be a day out of term; whereas a special memorandum states that on a particular day the plaintiff, according to the practice of the court, brought his bill into the proper office and filed the same as of such a term, &c. The record, with this special entitling, states nothing more than that pleadings which according to the course of the court must be supposed to have taken place before the court in term, did in fact take place on a particular day which is not in term; but when the action was commenced cannot, strictly speaking, be fairly inferred from this entry. A special memorandum, stating the bill to be filed on such a day, shews by that statement that the suit commenced on that day, because the bill is the process. But the same cannot be said of this record. It conveys no certain information to us of the day on which the declaration was filed; and if it did, the declaration is not process, as the bill is in England; and shewing when it was filed, does not shew when the suit was commenced—at least as regards this statute—though it may suffice when the commencement of the action is to be ascertained for other purposes.—Imp. C. P. 187.

Our records are made up as records are made up in England in the Common Pleas, where *capias* is the first process; and as they are made up in the King's Bench, where the suit is by original. In such a case there is no memorandum of the filing of any bill, and all that is found in the books on that subject is inapplicable; but the head-

ing the record must be taken to be the time of declaring, or rather, *may* be so taken, for it may be the time that issue is joined. It cannot, however, mean any time anterior to declaring, for the process is not entered on the record. A record made up as this is, therefore, might import (without the special date added at the foot of the *placita*) that on the first day of Trinity term (16th June, 1834) the plaintiff filed his declaration, or perhaps that on that day the parties were at issue. As that would be too soon after the delivery of the bill of costs, the plaintiff adds at the foot of the *placita*, "to wit: 10th July, 1834," which may import that on that day he filed his declaration, and in fact he proved this same thing by producing his declaration filed on that day. After all however, notwithstanding these actual distinctions, the case of *Webb v. Prichett*, 1 B. & P. 263, seems to me to be a case expressly in point, applying to a record made up as this is, (i. e., where no memorandum is inserted of the filing of any bill, but a mere *placita* at the head as of the term in which declaration is filed); and I take the effect of that decision to be that the plaintiff in this case proved enough by producing the record, for as the *placita*, if of the term generally, would have been against him, when unexplained, so if it would shew in his favor without explanation to the contrary, it shall be so taken, and it is left to the defendants to shew a proceeding of an earlier date than the record informs us of. The adding the particular day, as 20th July, makes that the earliest day of which the record gives information; and therefore there is the same ground for saying in this case, that *prima facie*, the plaintiff is not too early in suing, as there was in *Webb v. Prichett*.

It is true that the process must in point of fact have been before declaration, and so it must in *Webb v. Prichett*. That record only shews when declaration was filed, in like manner as this does. I think, on closer examination, the adding the day will do, as added here, and then that case becomes an exact authority in this. The principle on which *Webb v. Prichett* proceeds, seems to be this, that the date of the earliest proceeding of which the record conveys information, shall be taken to be the time of commen-

cing the suit, until the contrary is shewn. We know, to be sure, that generally speaking, the declaration is preceded by process, but it is not necessarily so; the record gives us no information of the process, and it is left to the defendant to give proof of it, where it would repel the presumption arising from the record. The plaintiff, in my opinion, should have the benefit of his verdict.

SHERWOOD, J., and MACAULAY, J., concurred.

Per Cur.—Postea to the plaintiff.

PENNIMAN V. WINCE.

A rule for judgment as in case of nonsuit was discharged on the peremptory undertaking without costs, when owing to delay occasioned by an application of the defendant, the plaintiff had been prevented from entering his record for trial on the commission day of the assizes, and the defendant refused to consent to its being entered afterwards, until the plaintiff's witnesses had gone home, and he knew that the plaintiff could not proceed to trial.

The plaintiff, who had been embarrassed and delayed in his proceedings, by an application made by the defendant in chambers shortly before the assizes, had sent up his record to Hamilton to be entered, and by some mischance it did not arrive till the day after the commission day. The plaintiff was desirous of trying his cause, but the defendant would not assent to the record being entered, although at a late period of the assizes, when the plaintiff's witnesses were not in attendance, he signified his willingness to go to trial. These facts were shewn by affidavit on opposing a rule nisi obtained by the defendant for judgment as in case of nonsuit, for not going to trial pursuant to notice.

The court discharged the rule on the plaintiff's undertaking peremptorily to try at the next assizes, without any condition as to the payment of costs—there being no wilful laches on the part of the plaintiff, and the defendant being himself unwilling to assent to the bringing on the cause, as the plaintiff at an early period of the assizes was desirous of doing, but could not do without defendant's assent.

Per Cur.—Rule discharged on peremptory undertaking.

FAIRCLAIM EX DEM. THOMPSON V. PUTNAM.

The court refused an attachment against a witness for not attending, who resided 25 miles from the court house, and was subpœnaed only the day before the trial.

E. C. Campbell moved an attachment against a witness for not attending at the trial of this cause. The witness was subpœnaed at his place of residence (25 miles from the court house) on one day, to attend the following morning when the cause came on. But though he might by setting off immediately, have arrived in due time for the trial, the court held his absence under such circumstances, no ground for an attachment, and

Refused the rule.

 MONK V. CASSELMAN.

The court refused a new trial in case for seduction, where the jury had found for the defendant, on evidence clearly impeaching the character of the seduced, although affidavits were produced on the motion, that if the plaintiff had a new trial he would rebut such evidence, and that he would have been prepared to have done so at the former trial had he had notice.

Case for seduction. After the case was made out by the evidence of the plaintiff's daughter, the defence was gone into, and testimony adduced which impeached the character of the girl for chastity, and shewed the plaintiff to be of dissolute habits. The jury, after a long trial, found for the defendant, and this term *Draper* obtained a rule nisi to set aside this verdict, and for a new trial, principally upon affidavits setting forth that if a new trial were granted, the plaintiff could adduce evidence which would falsify the charges against his daughter's character, of which charges he had no sort of notice until the witnesses gave their evidence at the trial. *Bogert* shewed cause.

ROBINSON, C. J.—We are of opinion that a new trial should not be granted in this case, either upon the evidence or upon any ground furnished by the plaintiff's affidavit. The defendant upon the trial had to vindicate himself upon a charge of seduction, said to have been committed by him under such circumstances that if he had been found guilty by the jury, he must have been rendered forever infamous. After a full, and for all that appears, a perfectly fair trial,

he has been acquitted, and it must be some very strong and plain ground that would warrant us in putting him again upon his trial. It is alleged that he fled when the charge was first made against him, that certainly is a most unfavorable circumstance, but it may be capable of satisfactory explanation; and at any rate, with a knowledge of that fact, and a due consideration of all other facts and circumstances, he has been found not guilty. Except his alleged withdrawal from justice for a time, there was no circumstance in evidence controverting the testimony of the single witness on whose evidence the charge rested. She is evidently a young female of unusually depraved character and licentious habits, if dependence can be placed on the testimony of numerous witnesses. The jury, whose peculiar province it was to judge of the credibility of the evidence, might nevertheless have believed her, but we have no authority to say they *ought* to have believed her. Much proof was given of the plaintiff being a man of profligate character, so exceedingly profligate indeed, that the ruin of the morals of any member of his family must seem to have been more justly attributable to himself than to any other cause. Whether the jury gave their verdict for the defendant upon the ground that such a parent had no claim to compensation for an injury of this kind, or because they disbelieved the testimony of the child, and were not satisfied of the defendant's guilt, is only known to themselves; if it were upon the first ground, they should have given some damages, however trifling, rather than have held the action to be barred. The case, as it stood before them, was one of that character, that if they had given a contrary verdict and had given heavy damages against the defendant, I should not have been inclined to interpose, because I should then have looked upon the defendant as having been proved guilty of the offence; and however slight may have been the claim of the plaintiff to damages, we should have scarcely interfered to relieve the defendant from the punishment imposed upon him by the jury. On the other hand, as the case now stands, we must either suppose the jury have found the defendant innocent of the charge, or that

they consider the plaintiff altogether unworthy to come into a court claiming compensation.

Taking it upon the latter ground, which would have been most favorable to the plaintiff's case in a merely legal point of view, still we cannot consistently with settled legal principles interfere. If we were to grant a new trial, it must either be because we differ in opinion from the jury upon the evidence, and think more favorably than they did of the plaintiff's conduct, or because we should desire for the interest of morality, and for the sake of society, that the defendant should at all events be punished. Upon the first point, I cannot say that my opinion does differ from that of the jury, and if it did, theirs is entitled to prevail in a matter of this kind, not merely because the matter is one peculiarly within their province, but also, because they most probably had the advantage of an intimate knowledge of the parties, which would aid them in forming a correct judgment. Upon the second point, it must be observed, that it would be entirely against principle to make that the ground of subjecting a party to a second trial upon such a charge. If we think of the case in that light, that is with a view to *punishing* the supposed offence, we must then consider that it is against the principles of our law that a man should be *tried twice* for the same cause, when there had been nothing defective or irregular in the first proceeding.

I will add farther, that so far as respects the public morals, it is worthy of consideration that we ought not, except to answer the necessary ends of justice, to expose the public a second time to the hearing of such disgusting details as occupied the attention of the court and jury upon the trial of this case, and certainly not from any indulgent consideration towards a parent whose character appears in such a light as that of the present plaintiff.

Per Cur.—Rule discharged.

DOE EX DEM. LASHER V. EDGAR.

The court set aside nonsuit for not confessing lease, &c., judgment and *hab. fac. pos.*, on its being shewn on affidavit that defendant's attorney intended to have entered into a special consent rule, but through some inadvertence had been omitted, in consequence of which, no defence was or could be made—on payment of costs, and on condition that no action should be brought, if any entry had been made under the *hab. fac. pos.*

The plaintiff in this cause was nonsuited at the last assizes for non-confession of lease, entry and ouster. Judgment was entered on the first day of term, and *hab. fac. pos.* issued. *Kirkpatrick* moved to set aside the nonsuit, judgment, and *hab. fac. pos.*, and to restore the possession it changed upon payment of costs, on affidavit, shewing that through some inadvertency or misunderstanding a common consent rule had been entered into, when the circumstances of the case required it to be special, the question being whether the land claimed formed part of one particular lot or of another, and that in consequence, no defence was or could be made at the time.

The court, on condition that if the possession had been changed no action of trespass should be brought, and on payment of costs, made the

Rule absolute.

IN RE PETER PAUL LACROIX.

A mandamus was granted against the clerk of a court of requests, to give up the books and papers of the court, which he had refused to do, on being removed from office.

The *Attorney General* obtained a rule last term, calling upon Peter Paul Lacroix, to shew cause why a mandamus should not issue commanding him to deliver over all books, papers, &c., belonging to the Court of Requests in the County of Kent, of which he had been clerk, to his successor, and why he should not pay the costs of this application, he having been displaced. And now, on the return of the rule, no cause being shewn, the court made the

Rule absolute.

REX v. JUSTICES OF BATHURST.

Where a person had been convicted before Justices of the Peace and fined, and on appeal to the Quarter Sessions the Justices there admitted more evidence than had been heard on the conviction, and the accused party was acquitted, but on receiving the opinion of the Attorney General that the additional evidence should not have been admitted, they confirmed the conviction and ordered it to be recorded but took no notice of the acquittal, the court made absolute a rule for a mandamus commanding them to enter the acquittal.

In Trinity term last, *Baldwin* obtained a rule nisi, which was enlarged to this term, calling on several Justices of the Peace of the District of Bathurst, to shew cause why a writ of *certiorari* should not issue, to remove into this court all proceedings had before them in a matter of complaint on the prosecution of one Briggs against one Crossby, or why a mandamus should not issue to them to enter judgment on a verdict which had been entered for Crossby. It appeared on affidavits, that last summer Crossby had been tried and convicted of an assault and battery by the Justices under the petty trespass act, and was fined 4*l.* and costs, for which he gave his promissory note to one of the Justices. Crossby afterwards appealed to the Quarter Sessions, and on a trial had in that court before a jury, was acquitted, upon which he demanded his promissory note, which was refused him. At this trial, evidence not given before the convicting Justice was heard by the assent of the majority of the Justices then presiding; and the propriety of admitting this evidence being questioned, the point was submitted to the Attorney General, who gave as his opinion that no testimony ought to have been received in sessions but that of the witnesses who appeared and were examined before the convicting Justices. The fresh evidence adduced before the jury at the session evidently influenced their verdict on the appeal. Upon receiving this opinion, the court of Quarter Sessions confirmed the conviction and ordered it to be recorded, taking no notice of the verdict of acquittal on the appeal. Notice of this motion was duly given to the magistrates, and now on the return of the rule

The court granted the rule for a mandamus absolute.

KING'S BENCH.

HILARY TERM, 6 WILLIAM IV.

BANK OF MONTREAL V. D. BETHUNE.

A foreign corporation—to wit, a bank—cannot maintain an action upon promissory notes discounted and received by them in the course of conducting banking business in this province; although they may maintain an action for money had and received to their use, against the party for whom such promissory note was discounted, and to whom money was advanced upon it.

Assumpsit. The plaintiffs sued by the corporate name of the President Directors and company of the Bank of Montreal. The declaration contained six counts, charging defendant as maker of six promissory notes, payable to J. G. B., or order, and endorsed by him to plaintiff. The seventh count charged him as payee and first endorser of a promissory note, made by J. G. B., payable to defendant or order, and endorsed by defendant to plaintiff. The 8th count was *indeb. assumpsit* for money lent, paid, laid out and expended, and had and received; and the 9th count upon an account stated.

Pleas—1st. Non assumpsit. 2nd and 3rd to the first count—That the Bank of Montreal was an illegal association, prohibited by the British statute, 14 Geo. II. ch. 37. To the 7th count usury was pleaded, and another plea that the note sued upon was endorsed to plaintiff in this province in the course of an unauthorized and illegal business, which plaintiffs carried on in the province as bankers, not expressly founding the defence on the British statute 14 Geo. II. Issue was taken on the plea of usury, but that defence was afterwards abandoned. The plaintiffs demurred specially to the other special pleas, and obtained judgment in Easter term last. Before the argument of the demurrer, the cause was tried at the Midland district Assizes, and contingent damages were assessed at 100*l.* 7*s.* 6*d.*, being the principal and interest due upon the several promissory notes. On the trial before the Chief Justice, the making of the notes, the endorsements, presentations and necessary notices, were admitted by the defen-

dant's counsel, and a number of letters were put in and admitted, which had passed between the Cashier of the Montreal Bank, resident in Montreal, and the two Messrs. Bethune, who were parties to all the notes, either in capacity of maker or endorser. It was admitted that the plaintiffs suing in this action as President, Directors and Company of the Bank of Montreal, were incorporated in a banking company by an act of the Legislature of Lower Canada, a copy of which was delivered into court; that this bank had established an office of agency at Kingston in this province, which had existed there for more than four years before the trial, (in 1834), and which was conducted by an agent, whose particular mode of appointment was not shewn; that it was the duty and business of this agent to cash drafts on the Bank of Montreal, to collect notes and drafts which had been discounted at the Bank of Montreal, on the credit of persons residing in this province, and to discount notes offered to him at Kingston in the usual course of banking business, deducting the interest for 90 days, and advancing the money for such notes in bills of the Montreal Bank, signed and first issued at the Bank of Montreal; and these notes were made and endorsed for the purpose of being discounted in that manner, and were discounted by the agent at Kingston, some of them for this defendant, and others for Jas. G. Bethune, the amount, deducting the interest, being paid at Kingston in bills of the Montreal Bank. These admissions were made with a view to found upon them any objections to the plaintiffs' right to recover which the defendant might choose to urge in the following term, on motion for a new trial on the ground of misdirection or otherwise, no point being reserved at nisi prius—and they were brought before the court on motion made for new trial in Trinity term.

Draper, for the defendant, raised the following objections for setting aside the verdict as contrary to law: 1st. Because a foreign corporation cannot conduct business in this province, and cannot sue on a contract made out of that country in which they are incorporated. 2nd. That a foreign corporation cannot sue at all in this province. 3rd.

That the plaintiffs came within the provisions of the British statutes 6 Geo. I. ch. 18, and 14 Geo. II. ch. 37, in their inception as a corporation, or when they commenced business in this province; and 4th. For misdirection generally, in allowing plaintiffs to recover on the evidence given.

The charter produced is contained in a provincial statute of Lower Canada, passed in 1820, entitled "An act for incorporating certain persons therein named, under the name of President, Directors and Company of the Bank of Montreal." It appears to have been presented to the Governor on the 17th March, 1820, and reserved for the signification of his Majesty's pleasure. On the 18th May, 1822, it was assented to by his Majesty in the privy council, and on the 22nd July, 1822, the royal assent was signified by a proclamation published in Lower Canada. The statute has this preamble: "Whereas the establishment of a Bank at the city of Montreal by Legislative authority, would be conducive to the establishment of agriculture and commerce, and promote the prosperity of this province; and whereas divers loyal subjects of his Majesty in this province, by their humble petition in this behalf, have represented that an association has been formed, in which they have become subscribers and stockholders, for the purpose of establishing a Bank *at the said city* of Montreal, under certain articles of agreement, &c., and that the said Bank is now engaged in carrying on the business for which it was instituted, and have prayed that for the better effecting the purposes of their association, they, their successors and assigns, may be incorporated under regulations and provisions as nearly corresponding with the terms of their original association as may be." It then enacts that the persons named (and their respective representatives) shall be, and they are thereby ordained and constituted a body corporate, &c., by the name of the President, Directors and Company of the Bank of Montreal, and shall so continue till the 1st June, 1831; and by the same name shall be capable in law to sue and be sued, &c., in all courts and places whatsoever, and to purchase and hold real or im-

moveable estate for the convenient conduct or management of the business of the said bank, (not exceeding 1000*l.* in value), and for no other purpose, and may have a seal, &c., and may make such bye laws, &c., as may appear necessary for the management of the said bank, and may do and execute by the name aforesaid all and singular other the matters and things touching *the management of the business of the said corporation which to them may appertain to do.* The capital is limited to 250,000*l.* Thirteen directors are to be chosen annually to manage their business, and in case any of them should be *absent from the province* for three months at a time, his place is to be filled up by another to be chosen by the remaining directors. The directors are to appoint such officers, clerks and servants, under them, as shall be necessary *for conducting the business of the said corporation.* In suits at law against the bank, process may be served upon the president or vice president, or *at the office of the said bank.* No person shall be a director who is not a stockholder actually resident in the city of Montreal: the debts of the bank shall never exceed three times the amount of the capital paid in, and the deposits: the stock to be transferred in the manner pointed out: the books, papers, correspondence and funds of the said corporation, shall at all times be subject to the inspection of the directors: the corporation are not to deal directly or indirectly in anything except bills of exchange,—discounting on notes of hand, or promissory notes, and to receive the discount at the time of negotiating—gold or silver bullion, or in the sale of stock pledged for money lent and not redeemed: that the notes of the corporation shall be payable in current gold or silver coin: no stockholder to be liable in his natural capacity for the debts of the corporation: the Governor, or either branch of the legislature, may require from time to time, from the president and directors of the corporation, statements of their capital stock, debts due to them, monies deposited in the bank, notes in circulation and cash in hand: they shall not raise loans of money, *nor increase their capital.* This act was to be in force till 1st June, 1831, provided, how-

ever, that if before that time a provincial bank should be established by the legislature, then after the expiration of seven years from the passing of that act, this corporation should be dissolved, and all their powers, rights, &c., should cease. By an act, passed 26th March, 1830, this statute was continued to 1st June, 1837, and some amendments made at the same time in its provisions,—among others, that the total amount of notes for less sum than 25s. in circulation at any one time, should never exceed one-fifth of the capital paid in, and that the legislature of Lower Canada may at any time suppress or limit the issue and circulation of all the notes under 25s.; and that if the corporation shall issue in all a greater amount of bills than their charter authorizes, both the statutes of incorporation are to cease and determine, from the time of such excessive issue taking place. There is also a provision that both of these statutes shall cease within ten months after the expiration of an act passed (1st. Geo. IV.) incorporating a bank under the name of the Quebec Bank, unless the last mentioned act should be continued or amended, or unless an act should be passed for the incorporation of some other bank by the provincial legislature,

The case was argued last term, by *Sullivan* for plaintiff, and *Draper* for defendant, and now judgment was given.

ROBINSON, C. J. (After stating the case *ut supra*).—I have cited all such parts of these statutes, forming the charter of the company, as seem to me to be in any degree material for the purpose of shewing—1st. Whether the 6 Geo. I. ch. 18, or the 14 Geo. II. ch. 37, apply to this institution.

2nd. To what objects the corporation is restricted.

3rd. To what locality it is intended to confine it.

With respect to 6 Geo. I., and 14 Geo. II., after the opinion of this court given in the case of the Bank of Upper Canada v. Bethune, it is scarcely necessary for me to say that I think no objection to the plaintiffs' recovery can be grounded upon them. We have already decided that the 6 Geo. I. ch. 18, is not now in force in this province since its repeal by the statute 6 Geo. IV., and to that

opinion I adhere. The 14 Geo. II. ch. 37, was passed for the purpose of carrying into effect in the colonies the 6 Geo. I. ch. 18, by removing some obstacles that had inadvertently been left in the way of its practical operation. It was never meant that it should have the effect of extending that statute to the colonies after it should have ceased to exist, and more especially after its repeal, not for any temporary or local cause, but from the conviction of parliament as expressed in the preamble to the repealing act, that the nuisances which it was designed to restrain would be more properly dealt with by the application of the principles of the common law. It is further my opinion, that admitting the Bank of Montreal to be a legally chartered corporation in Lower Canada, and therefore not such an association as would come within the prohibition of these statutes, supposing them still in force, then it cannot be brought within the statutes by reason of its extending its transactions, legally or illegally to this province, through the instrumentality of an agent. They have created no illegal stock, and have associated in no illegal manner, nor for any illegal purpose. But, being legally a body corporate in Lower Canada, they have presumed, it is said, to act illegally as a body corporate here, and that such presuming to act as a body corporate here without legal authority brings them within the statute—surely that would be a strained construction. The act attempted to be done by them here, may indeed be void, but the corporation still legally exists in Lower Canada, and in Lower Canada only; it never was in this province, and cannot therefore have constituted a nuisance here, nor can it be declared or made an illegal body by our laws. And the fact is not that the Bank of Montreal has presumed to act as a corporation within this province—they have presumed to appoint an agent for this province, not to act as a corporation here, but to act for them, the corporation existing in Lower Canada, to lend their money here for them, and to take notes to them for the repayment—that is, to the corporation continuing in Lower Canada. Whether they *could* transact business in this manner by their agent, is a question to be disposed of

on other grounds. The statutes referred to would not in my opinion govern that question, nor affect the right of the plaintiffs to recover, admitting them to be fully in force. Then, with a view to determine the main question, whether this corporation could conduct the business of banking in this province, and can sustain an action in our courts upon causes of action accruing to them in the course of such business, it is to be observed that their charter clearly contemplates their sphere of action, as confined to Lower Canada. The avowed motive to the granting this charter was to serve the agricultural interests of Lower Canada. Those who were to conduct its affairs are required to be all resident in Montreal, and to manage its business there. Their debts and issues are to be limited—their books, papers, correspondence and funds, are to be constantly subject to the inspection of directors who must be resident in Montreal. They are not to increase their capital, and they are to be ready at all times, to shew to the Governor and Legislature of Lower Canada, the amount of debts due to them—the monies deposited with them—their notes in circulation and their cash in hand. How all this can be complied with while they have agents in foreign countries, with power to act as bankers, to issue their bills, and discount notes, without any limit as far as appears to us, it is not easy to conceive. There is nothing in the charter to shew that the Legislature which gave it contemplated their extending their business to other countries, and there is much to shew, on the other hand, that this was not contemplated. What is more material however, is, that the Legislature of Lower Canada could not have given to them any powers to be exercised in another country, further than the laws of such other country might admit, and that any effort towards it on their part, must have been vain.

The facts then are, that this Banking Company are incorporated in Lower Canada, under a charter which cannot give them a right to extend their business to this province, further than our laws may allow—which does not expressly give them any authority to transact business of any kind here, and which, moreover, contains provisions

and restrictions which seem to contemplate and require that they are to conduct the business of banking in Lower Canada only. The question is, can such a bank establish an agent in Upper Canada, for the purpose of discounting notes and bills of exchange, and issuing their bank bills upon such discount, and can they sue in our courts as endorsees of a promissory note transferred to their agent in this province in the course of such a transaction, without any previous reference to the corporation at Montreal? It is an important question in several points of view, and one that it is exceedingly desirable should be settled with no unnecessary delay, after it has been once agitated. It comes before us perhaps under rather fortunate circumstances, for it appears from the letters given in evidence in this cause, that the agency in question has been for some time withdrawn, so that it is probable, our opinion, if unfavorable to the assumed right of these plaintiffs to make contracts in this province, will occasion less inconvenience, (if any), than it would have been attended with, if their right in a similar case, had been called in question some years ago, when their transactions in this province were extensive and numerous. Whatever be the law of England on this question, our Legislature has passed no act to vary it, for upon examination of the only provincial statute which has any apparent bearing, namely the act 4 Geo. IV. ch. 13, it is evident it cannot affect the question. That act neither expressly nor impliedly sanctions the carrying on of business in this province by foreign banks. It simply enacts that *no body corporate* or person shall carry on the business of banking, unless they redeem their notes in money on demand at their place of business, within this province. 1st. This act is temporary, (for four years), and has now expired. 2nd. It contains an express saving clause, that it shall not be construed to legalize, (by implication), any corporation or any transactions which would have been otherwise illegal. And 3rd. It makes no allusion to foreign corporations, and therefore if such, cannot legally make contracts, the Legislature cannot be supposed by us judicially (whatever our private belief or

opinion may be) to have contemplated them as doing business here, or to have intended to make any provision for their regulation.

Treating the question therefore as a general one, to be governed by the principles of the law of England and the authority of adjudged cases, it will be found to lie within a very narrow compass. Upon the argument, the counsel for the defendant disclaimed, and I think properly, the resting it entirely or mainly upon grounds of public policy; he relied rather upon the established principle, that a corporation cannot exercise powers which are not conferred by its charter, and that our court cannot recognize the right of a foreign corporation to sue upon a contract made beyond its proper sphere of action. In regard to the question of policy, argument founded upon the supposed impolicy of recognizing and enforcing such contracts can weigh nothing with us, unless they are so clear and so decisive as to form in themselves a clear ground of deciding the question upon legal principles. I mean that objections of this nature, if not sufficient of themselves to prevail must be dismissed, and cannot be allowed by us to add to the strength of objections of another nature, resting on merely technical rules of pleading and evidence, and the legal competence of parties to sue. As the defendant does not rest his case upon the impolicy merely of allowing foreign corporations to carry on banking in this province, and as my opinion is not formed on that ground, it is not necessary to enlarge upon it. One could not however, overlook several considerations, which would readily occur in looking at the question in that point of view. So far as the objection of impolicy might be urged, on account of the consequences in diminishing the business and profits of our own chartered banks, we could not as a court of justice proceed upon grounds so narrow. Supposing the foreign bank solvent, and well secured and their paper good, the general advantage arising from their circulating it here might, according to circumstances, much outweigh the consideration of loss to our own bank, from diminished business; and if it were otherwise, it would rest with the Legislature, (supposing

such a course of banking were otherwise legal), and not with this court, to determine the question of policy and to protect the public interest. This business of banking, the lending money by discounting notes, and issuing a paper currency, is of too recent introduction to allow us to say that there is in the principles of the common law any inherent opposition to it, for long after the foundation of these principles were laid, banks were known only as places of deposit—the present practice of banking is of comparatively modern introduction. The point upon which there is the most obvious reason for scruple and jealousy, is the admission of their notes as a circulating medium—a substitute for specie—but clearly we could not say, that because the discounting the notes sued in this action, occasioned the issuing of foreign bank notes, the plaintiffs shall not recover upon principles of public policy. We have always had foreign bank notes in free and unrestrained circulation among us—for many years the notes only of banks in the United States, afterwards of banks in Lower Canada. Before we had sufficient capital to establish a bank in the province, the circulation of foreign notes was almost necessary—it was at least most convenient, and so generally admitted to be so, that the Legislature more than twenty years ago passed an act to prevent as much as possible, the introduction of those which were spurious, by making it a crime to forge or to alter them. It is clear that bills of foreign banks may be freely put into circulation here, and whether by individuals or associations can matter little.

Upon the question of policy merely, much may be said on both sides; but for the reasons I have stated, it is not necessary to pursue it. Upon the strict legal question of what it is competent to this corporation to do, looking at its charter and its foreign character, I am of opinion that the plaintiffs cannot sustain their action as endorsees of these notes. The letters given in evidence shew no privity between the defendant and the corporation in Montreal, in the inception of the transaction, nor until after its completion, and the defendant can be no otherwise said to have contracted with the plaintiffs in Lower Canada, where alone

they have legal existence, than by admitting that they can empower an agent to represent them in this province, whose contracts in the course of banking business originating here, and conducted without reference to the company, shall bind them on the one hand, and enure to their benefit on the other. The question being now for the first time raised, we are driven to consider—1st. Whether there are in this case two parties respectively capable of contracting; and 2ndly. Whether these plaintiffs could legally acquire the cause of action on which they are suing; and in order to determine these points we must regard the plaintiffs—1st. as they are a corporation; 2ndly. as they are a foreign corporation.

In the case of an individual inhabitant of Lower Canada suing in his natural capacity upon a cause of action like this, no question would arise, because he could certainly engage in the kind of transaction out of which this action springs. In doing so he would be merely exercising an ordinary right of an individual, to which the laws of this province offer no obstructions. But it is otherwise with respect to corporations. When an individual sues upon a contract, the question is, what is there to prevent his making such a contract? On the other hand, when a corporation sues on a contract, the question is, where is there authority for entering into it? In the former case, the proof of an exception to the general right lies on the defendant. In the latter there is no such general right, and the corporation in every case must shew its authority for making the contract or transacting the business, out of which the alleged cause of action springs.

The English cases upon corporations relate chiefly to the municipal bodies created by charter, for the management of the affairs of towns; and the right or mode of election, the amotion of officers, or the authority of making bye laws, are the principal points raised in them. There is not much to be found in adjudged cases bearing directly on the question before us; but what we do find either in cases decided by the courts, or in books treating of the nature and power of corporations, leads clearly to a decision

against the plaintiffs' right to recover upon the notes sued on, while the opposite view of the question does not appear to be sustained by any authority, on which we could rely. In the case of *Broughton v. the Manchester Waterworks Company*, 3 B. & A., Bayley and Best, J. J., intimate strongly their opinions, that upon general principles of law a corporation cannot bind themselves in any contract foreign to the purpose for which they were constituted. There are certain things incidental to corporations, even where their charters are silent, and these are—1st, to have perpetual succession: 2ndly, to sue and be sued: 3rdly, to purchase and hold lands: 4thly, to have a common seal: 5thly, to make bye laws, It is the second—viz., to sue and be sued, that alone applies here; this power is given expressly in this charter in a general manner, no intention is shewn to extend it further than the common law would extend it, if the charter had been silent, and any attempt to do so would of course have been nugatory as an act of the Legislature, i. e., in respect to any effect it could have had in this province. Then it is next to be considered, that corporations have no natural existence—they are the mere creations of positive law, and are established for the maintenance and regulations of some particular objects of public policy. They exist only by virtue of their charter, and have no other capacity than such as is necessary for carrying into effect the purposes for which they were established. When they attempt to act beyond and out of their charter, they can, in my opinion, acquire no right or interest by virtue of such act, and their existence on such occasions, and for such purposes, cannot be recognized by the courts. They may bring all such actions as are necessary to assert their rights when invaded, or to give them a recompence for any injury done them, or a remedy for any debt or duty withheld. Upon these principles, I apprehend it follows, that if a corporation aggregate created in this province for a purpose unconnected with trade, composed for instance of a number of trustees for the management of a school, were to enter upon the business of banking, issue bills and discount notes, they could not be recognized as a corpora-

tion having any right for a purpose so foreign to their charter, and could not sue as endorsees of securities acquired in the course of such business. Taking this to be so, then it appears to me equally clear, that a corporation created in Lower Canada for the purpose of carrying on the business of banking there, can have no more authority within this province to act as bankers than a corporation would have which had been created here for purposes wholly distinct from banking. It may be admitted, doubtless, to sue in our courts upon causes of action contracted in Lower Canada, while acting within the scope of its powers. The case of the Dutch East India Company v. Henriques, 1 Str. 612, 2 Ld. Ray, 1528, goes no further; and it is not necessary in this case to raise the question, whether it might not also be allowed to sustain an action in our courts upon a security taken in this province, in order to the settling or securing a debt originally contracted in Lower Canada. The present case however, goes further than any authority which I am aware of can be found to warrant. By establishing the plaintiffs' right to recover, we must decide that a foreign corporation can sustain an action in this province upon a contract not made in Lower Canada, and arising wholly out of business which their charter neither gives nor could give them any authority to transact.

In reference to some parts of the charter cited, I must remark that it may well be doubted, whether in justice to the stockholders, to say nothing of other grounds of public policy, the directors should be suffered to engage in business not contemplated by their charter. It has further, not escaped observation, that from the statutes given in evidence it is not made clear to the court, that the charter of the plaintiffs is still in force, since it is not shewn whether the charter of the Quebec Bank has been continued or when it would expire, and the charter of the Montreal Bank is only to endure ten months after the charter of the Quebec Bank.

In looking at the consequences of sustaining such transactions of a foreign bank as have given rise to this action, it has not failed to occur to us that it may be said truly, that any individual may freely discount notes in this pro-

vince, and may pay out the bills of the Montreal Bank as cash in the course of such transactions. So might any person or association of persons in Lower Canada not incorporated, employ an agent in this province to discount notes, paying out in like manner the bills of the Montreal Bank; and it may be contended, that the public are not more secure in having this paper currency introduced into this province by these means, than they would if they were put in circulation by the agent of an incorporated company. It is true also, that the taking these notes as endorsees, did not require the presence of the company within this province, nor call for any act to be done by them, which it might be contended they were not authorized to do, and that when the notes were endorsed, such endorsement must be taken to transfer them to the plaintiffs residing in Lower Canada, and so enable them to sue as upon a cause of action accruing to them there. Neither have we overlooked the application which may be made of the principles which I have mentioned, to the case of foreign Insurance Companies transacting business in this province.

We are not called upon here to advert particularly to cases of this description. Each must depend upon its own facts, and it is only necessary to say that it is not because the corporation suing here happens to be a banking institution, that we consider it incompetent to extend its acts to this province. The principles are general upon which we decide, and the authorities upon which we ground our opinion are—1st, the cases are very few in number in which foreign corporations have brought actions in England, and in which it seems to have been allowed cautiously, and not without question or discussion, whether they could of right maintain such actions in England, even upon contracts made with them in the country where the corporation exists, and within the scope of their authority: 2ndly, those cases in which it is laid down that a corporation cannot make a contract which shall bind it, except it be in the conduct of its proper business as prescribed in its charter; and 3rdly, the principles clearly and explicitly laid down in books treating of corporations and their powers—that they are so

limited by their charter, that with the exception of the few incidents which I have already mentioned, as belonging to all corporations aggregate, they can assume nothing which their charter does not authorize.

Having a strong repugnance to the defence set up in this action, I have come to the conclusion which I have expressed, with more difficulty than my brothers, but I fully agree in the opinion that the action cannot be sustained by the plaintiffs as endorsees of the notes sued on. It does not, however, follow that the plaintiffs are to be entirely defeated in their recovery. For all monies which the defendant received from their agent for his own benefit, he is accountable as for money had and received to their use—he can have no right to retain it and leave his notes unpaid. It is not like a case in which a prohibiting statute has been violated, or an immoral contract been entered into; nor do I assume that either party engaged in the transaction with a consciousness that it would not be sustained in law; they are rather to be regarded as in a common error. The defendant has received large sums of the plaintiffs money; and since it appears that he cannot be compelled to pay the notes which he gave in return, it is contrary to equity and good conscience, that he should retain the money borrowed. The note, which defendant merely endorsed, we cannot assume was discounted for his benefit, and it should therefore be deducted from the verdict. The parties are of course under no difficulty in ascertaining what proportion of the verdict rendered in this case may be allowed to stand, upon the principle I have stated; but if there is any uncertainty on that point, it must lead to a new trial. Generally, it is true that the first endorsee of the note is taken to have given value for it to the first endorser, and not to the maker; but the nature of accommodation notes is known to be otherwise, and the courts have made distinctions in their decisions which are founded upon this known difference. It is not assumed in cases of such notes, that a consideration must have passed between the maker and endorser. The inference is rather that the endorsers are mere guarantees, lending their names for the benefit of the maker, and

to enable him to raise the money; and the presumption arises when the note is discounted, that the maker has obtained the loan on the additional security of the endorsers. It may possibly be otherwise in any particular case, and if it be denied that it is so here, a new trial must be awarded to determine that. As to the plaintiffs' right to recover the money advanced, upon the count for money had and received, I do not feel the difficulty which presents itself to the mind of one of my brothers. I regard the plaintiffs not as usurping a royal prerogative by setting up a corporation in this province without authority; but rather consider, that as an actual legal corporation, they have endeavoured to do something which their powers do not extend to, and that so far their act is merely void. They thought that they, being a corporation in Lower Canada, could employ an agent to lend money for them here, and take notes to them for it, which they could not do.

SHERWOOD, J., (after stating the case).—To enable me to form an opinion I find it necessary to examine the two following questions, namely—1st. Can any joint stock company formed in this province act as a body corporate and make legal contracts in the ordinary course of their business, without the authority of an act of parliament or the King's charter? 2nd. Can a joint stock company incorporated in a foreign country, carry on their business, and make valid contracts as a body corporate in this province, by virtue of a foreign act of incorporation? As to the 1st point, I think it clear, that by the common law, no number of individuals could associate together and carry on any kind of business as a body corporate, without the consent of the crown, either express or implied. The authorities for this position are clear.—1 Roll. Abr. 512, 13; 1 Inst. 250; 1 Bl. Com. 472. An information may be filed by the King's Attorney General, in the nature of a writ of *quo warranto*, against any persons who presume to act as a body corporate without such consent.—2 Inst. 282; Finch. 100; 2 T. R. 567.

The 6 Geo. I. ch. 18, as far as respects the subject, was declaratory of the common law, and increased the penalty

for its infraction, but contained no new prohibition as regards the acting as a body corporate without authority from the crown; and this appears to be the construction put upon that statute by the Imperial Parliament, when they enacted the 6 Geo. IV. ch. 91, to repeal the 18th 19th and 20th clauses of 6 Geo. I. ch. 18. The latter act recited "that it is expedient that the several undertakings, attempts, practices, acts, matters and things in the said act of 6 Geo. I. mentioned, should be adjudged and dealt with in like manner as the same might have been judged and dealt with according to the common law notwithstanding the said act." From the foregoing premises, I think this conclusion inevitably follows, that any contract made by a joint stock company in this province, in carrying on their business as a body corporate unauthorized by law, must be wholly void, because it is based upon an illegal act. The case of *Duvergin v. Fellows*, 5 Bing. 248, was an action of debt on bond, given to secure the payment of a compensation to the obligee, for the formation of a joint stock company which was intended to act as a body corporate, and the court of Common Pleas held the bond to be void. The Chief Justice delivered the opinion of the court, and remarked that "persons who, without the sanction of the legislature, presume to act as a body corporate, are guilty of a contempt of the King, by usurping on his prerogative. By the 9th Anne, ch. 20, the court may not only give judgment of ouster, but may fine a defendant convicted on a *quo warranto*. This shews that the usurpation is considered as a criminal act. But it has been insisted that the usurpation is only criminal where a party without authority acts in a public office, and that the pretended corporation that these parties would set up, did not affect the public, but was a scheme with which certain individuals only were connected. Most of the statutes relating to *quo warranto*, from the statutes of Gloucester down to the 9th of Anne inclusive, have the words offices and franchises. Franchises are privileges for the advantage of individuals. In Com. Dig. title *quo warranto*, many things are mentioned as matters for which *quo warranto* will lie, which are

valuable only to the individuals who claim them against the crown, and are not connected with any public duty. But it concerns the public that bodies composed of a great number of persons, with large disposable capitals, should not be formed without authority from the crown, and subject to such regulations as the King in his wisdom may deem necessary for the public security."

The contract stated in the declaration in this cause would also be void upon the same principle, if it had been made with a joint stock company formed in this province, and presuming to act without the King's authority.

As to the 2nd point—Can a joint stock company incorporated in a foreign country, carry on their business and make valid contracts as a body corporate in this province, by virtue of a foreign act of incorporation? It was contended by the counsel for the plaintiffs, that there are cases to prove that foreign corporations may sue in the English courts, and he endeavoured to deduce from this position that such a corporation might also make legal contracts in England in the course of their ordinary business; or in other words, they might carry on the business in England for which they were incorporated in a foreign country expressly to carry on there. The cases of the Dutch East India Company v. Moses, Str. 613, and the Spanish National Bank of St. Charles v. Dr. Bennale, 1 C. & P. 569, were cited as sustaining this position. I have examined these cases. In the former it is stated that the covenant upon which the action was brought was made in Holland, and was to be performed there. The latter case was an action of assumpsit on a bill of exchange, and for money had and received. The plaintiffs were the National Bank of St. Charles in the Kingdom of Spain, and sued in a corporate capacity. Letters were put in and read, in which he admitted that he held in his hands a sum of 1900*l.*, the property of this bank. There was no evidence of any bill of exchange. There is nothing in the case to shew where or how the money of the bank came into the hands of the defendant, but his name clearly proves him a foreigner, and I infer from the circumstances of the case altogether, that

the money had been received in Spain, and that he had removed to England. Those two cases prove that a foreign corporation can sue in England upon a contract made in a foreign country, but in my opinion they prove nothing else—they do not approach the principal question, whether a foreign corporation can make valid contracts in England in the ordinary course of their corporate business. The admission of the former right, does not necessarily include the latter. There is an essential difference in their existence and effect, and they rest upon principles altogether dissimilar. The one takes its rise from the *comitas inter gentes*, that mutual consideration which is due from one civilized nation to another, but the other originates in the established laws of the land, which are alike binding on all its inhabitants. The comity of nations extends so far as to allow actions to be brought in our courts upon contracts made in a foreign country respecting personal property, and designed originally to be executed there, but from the removal of some of the parties into our country, the contracts must be enforced here or great injustice would occur. As the common law is founded upon principles of universal justice, it allows the declaration to state that the contract was made here, in order that it may be tried by a jury if necessary, but the validity of such foreign contract is generally tried by the foreign laws under which it was made. The common law however, does not allow the validity of any act done in this country to be determined by a foreign law; and therefore, when the action to compel the performance of the contract is brought in this country, the remedy must be had according to our laws, and no regard is paid to the foreign laws upon the subject of the remedy on the contract.—1 B. & A. 284; 3 Camp. 44.

If the remedy given here on a foreign contract by the comity of nations must strictly conform to our laws, the validity of any contract made here by foreigners must, *a fortiori*, be determined by our own laws. In the case of *Glegg v. Levy*, Burr. 1081, 3 Camp. 167, Lord Ellenborough emphatically said, "A contract must be available by the laws of the place where it is made, or it is void all

the world over." When a number of persons in a foreign country are invested by a law of this country with a political character and personality, to enable them to carry on some particular business there, and in that character make contracts in their own country, and the persons with whom such contracts are made remove into this country, justice as strongly demands the enforcement of such contracts here as if they were made by foreigners in their actual capacity. Public policy sanctions such a proceeding in both instances, and the law of the land is not against it in either. On the other hand, neither justice nor public policy requires that foreign corporations should have a right to carry on their ordinary business here; and I think I have shewn that no association of individuals is allowed by the law of England to act as a body corporate without the express consent of the King. If every foreign joint stock incorporated company may exercise its corporate right in this province, as a matter of course, what is to prevent the introduction here of foreign patent rights, for every description of new invention in foreign countries. If such were the case, the prerogative of the crown in granting or refusing such franchises, would be literally nominal. The same literal distinction extends also to foreign individuals. They are frequently invested with peculiar rights and privileges by the law of their own country, which they cannot exercise here, because our laws forbid it. A foreign attorney or surgeon cannot practice here for gain, without being licensed. He could not, therefore, sustain an action for work and labour performed here in his professional character. There is nothing, however, to prevent his bringing an action here for work and labour performed in his own country, according to the laws there. So a foreigner may recover a debt here, contracted in a foreign country, together with the legal interest due there, to the amount of even 10 or 12 per cent.; but he would not be allowed to make a contract here for such an amount of interest. It would undoubtedly be illegal. The refusal, however, to enforce such foreign contracts as last mentioned, would soon put a stop to all trade, and therefore the policy of our law allows actions to be brought and

sustained upon them, but it makes no difference between contracts made here by foreigners and by our own people. What is illegal with one is illegal with both, according to my view of the law on this subject. Both rest on the same base, and must stand or fall by the same principle of adjudication.

There is another ground upon which the plaintiffs contend the contracts in this place must be considered legal. They allege the act of incorporation, passed by the legislature of Lower Canada, operates in this province like a charter from the crown. If it does, there can be no doubt of the legality of the contract, and therefore the proposition merits consideration. There are but two ways by which the King can give his consent to the formation of a body corporate—namely, by act of parliament, and by charter under the great seal. The plaintiffs were made a body corporate in Lower Canada by act of the legislature of that province, to which the King gave his assent, and the act was in force within the limits of Lower Canada. It is very clear the act is not in force in this province; consequently, the King did not give his consent to the plaintiffs' being a body corporate here by act of parliament. The King's consent by act of parliament, cannot extend beyond the limits in which such act is part of the law of the land. As it was not alleged the King ever gave a charter of incorporation to the plaintiffs within the limits of this province, it is unnecessary to make any remarks on that head. My opinion is, that a joint stock company incorporated in a foreign country cannot carry on their business and make valid contracts in the course of such business as a body corporate in this province, by virtue of the foreign act of incorporation. I am also of the opinion, that the act of the legislature of Lower Canada, as regards the present question, must be considered in the same light as the act of a foreign country. Considering, therefore, the endorsement of the notes in the present case to the plaintiffs in the ordinary business of banking to be illegal, for the reasons already stated, the special counts of the declaration, in my opinion, cannot be sustained; and it remains to be examined whether any of the common counts

are good. There is a count for money had and received by the defendant to the use of the plaintiffs; but the notes mentioned in all the special counts, except the seventh, were made by the defendant payable to Jas. G. Bethune or order, and by him endorsed to the plaintiffs, who sue as endorsees; and in my opinion, the notes stated in the first six counts are not evidence on any of the money counts in this case.— 4 M. & S. 567; 3 Camp. 101; Gow. 22; 1 M. & M. 66, ib. 324. The note mentioned in the seventh count was made by James G. Bethune, payable to the defendant or order, and by him endorsed to the plaintiffs, and consequently is evidence of money had and received by the endorser (the defendant) to the use of the endorsees (the plaintiffs), unless the illegality of the endorsement prevents its being used in that way. The contract between the defendant and the plaintiffs for discounting the last mentioned note has been fully executed, the plaintiffs having paid, and the defendant having received the money upon it. The plaintiffs carried on their banking business as a body corporate at Kingston in this province. Their agent there had an office of discount for several years, in which notes and bills were discounted generally, as at Montreal by the board of directors. The note now in question was discounted by them through their agent at Kingston, in the course of their business as an incorporated bank. The present action is brought in affirmance of, and for the purpose of enforcing the performance of a contract, which I consider is prohibited by the law of the land; and therefore the plaintiffs are not innocent, and cannot, in my opinion, sustain this action to recover back the money paid by them to the defendant in discounting the note mentioned in the seventh count. In the case of *Holman et al. v. Johnson*, Cowp. 341, the court said: "If from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of the country, then he has no right to be assisted; it is upon this the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff." The public have an interest that the thing shall not be done,

and the objection in this case must prevail, not for the sake of the defendant, but for that of the public.—*Vide* Doug. 698; 8 T. R. 577; 8 Taunt. 492; 1 Camp. 547; 5 B. & A. 335.

The original contract between the parties being, as I think, contrary to law, it appears to me the subsequent letters of the defendant do not confirm or render the contract valid, or amount to a valid promise to pay back the money advanced on the original contract, as money had and received to the use of the plaintiffs.

MACAULAY, J.—The first question is, whether the British acts continued to have force of law in this province since the repeal of the 5 Geo. I. ch. 18, in England. I assent to that part of the luminous judgment, delivered by the Chief Justice in Easter term last, in the case of the Bank of Upper Canada v. Jas. G. Bethune, on which it is held that these acts ought not to be regarded as included in the general extension of the criminal laws of England to the province of Quebec by the 14 Geo. III. ch. 83, or in our provincial statute adopting the same as it stood in 1792, but that they prevailed independently by their own terms and the 18 sec. 14 Geo. III. ch. 83. Subsisting, therefore, purely as British enactments, they would cease to operate here whenever repealed in England, so that the 6 Geo. I. ch. 18, has ceased to exist throughout all his Majesty's dominions, leaving doubtful only, whether as a consequence, or by implication, the 14 Geo. II. ch. 37, fell with it, on the ground that the substratum on which it rested, and without which it could not endure as an independent act of parliament, was taken away. The arguments in favour of such implied repeal are forcible; and if I felt at liberty to treat that statute as only an explanation of, or a supplement to the 6 Geo. I., or as merely extending the application of the latter to the American colonies, I should readily subscribe to the opinion that they ceased together. I should equally think so, if it is to be regarded as a mere echo of the 6 Geo. I., not susceptible of being understood or applied without a reference thereto; but it appears to me that, taken altogether, it is more than a simple explanation—more than a mere expansion of 6

Geo. I. To a certain extent such is its office, as that certain matters therein recited were comprehended and embraced in the 6 Geo. I., and that the latter so explained, should extend to, and be in force in the colonies ; and had it stopped there, it must have been dependent upon the elder statute for its continuance and effect, and must necessarily have become inoperative when its precursor was as a law annulled. But it goes further, and in addition to the explanatory portions, enacts in substantive terms, that all the matters prohibited in 6 Geo. I., including those therein mentioned, should be illegal in America also. And the subsequent clauses, touching relief, &c., grant the remedies afforded under and by virtue of the latter act. Unless it be requisite to explain the contents of the recital to sec. 18 of 6 Geo. I. ch. 18, no reference thereto can be required, in order fully to understand the 14 Geo. II. ; for all the enacting part of that section is recited at length in the latter, so that it contains within itself everything essential to an independent statute. If all these portions of the American act, which are purely explanatory, or which merely relate to the extension of 6 Geo. I. to the plantations, were expunged, there would still remain substantively enacted, and apparent upon the face of the 14 Geo. II., all the provisions of 6 Geo. I., with the explanations therein given. No reference to the 6 Geo. I. can be at all necessary, unless something in the recital to sec. 18 (which is not introduced into the 14 Geo. II.) might be material, and the probable necessity for such a reference to ascertain what constitute those undertakings and attempts, alluded to in the enacting part of that clause as having been previously described, presents the principal obstacle as an argument against the views I entertain ; but, though a difficulty, it does not counterbalance antagonist considerations. It does not follow that because repealed, the 6 Geo. I. must be treated to all purposes as obliterated from the records of parliament as if it never had place there, so that access may not be had to its contents for the collateral purpose of assisting in the construction or application of a statute still in force, in the composition of which it may have been

auxiliary, or that may have reference to it as embracing subject matter adopted therein; and even though liable to be deemed expunged from the statute book as a law, so that judicial cognizance could not be taken of its former contents for any purpose, there would still remain visible upon the face of 14 Geo. II. many positive provisions capable of full application, without any extraneous aid, and peculiarly applicable to banking schemes, that in their objects, origin, constitution, tendency and operation, might contravene the same. I am not prepared to say that in those particulars at least (without anticipating questions that might arise respecting other matters) the 14 Geo. II. ch. 37, does not remain in full force as a law in the colonies, notwithstanding the repeal and absolute cessation of the 6 Geo. I. ch. 18 in England and America. The views of the rest of the court touching the effect of the repeal of the statute 6 Geo. I. ch. 18, upon the operation of the 14 Geo. II. ch. 37, renders it of less moment to consider the pleas demurred to, so far at least as they may seek to exhibit a case within the latter act. But, admitting it to continue in force, I should think the two special pleas to the first count bad on special demurrer, for the first cause assigned. I am not so well satisfied that the other causes are exceptions of equal validity. If no exception of form prevailed, I should not deem those pleas good in substance. It is not only necessary for the defendant to identify the plaintiffs in the suit with the persons unknown, who formed the illegal association complained of, but to set forth facts and to shew the court acts on their part, which bring them within the prohibition of, and render them amenable to the penalties and liabilities imposed by the statute. An examination of the English decisions upon 6 Geo. I. ch. 18 (14 Ea. 406), and a comparison of the facts, circumstances and spirit of those cases with the allegations in these pleas, will render apparent wherein they differ, and shew the necessity for a more precise and full statement than these pleas represent of the origin, objects, tendency and practices of such institutions as the plaintiffs are supposed to be, before they can be subjected to the prejudicial consequences that may follow an infraction of the 14 Geo. II. ch. 37.

Touching the special pleas to the 7th count, it is to be observed that the defendant does not deny the present corporate capacity of the plaintiffs, or their right to sue when the action was brought; but says, that before and at the time the note was made, they attempted to act as a body corporate—which is a matter of law—a conclusion of law from facts, and the facts are not alleged that shew it; also, that they pretended to act as a bank, which they might do without attempting to act as a body corporate, and that the note was delivered to them in the said pretended business of banking. It would seem admitted that the plaintiffs are entitled to sue now, and (as observed) their having acted as a bank does not necessarily import a corporate acting contrary to law. The causes of special demurrer appear valid. The plea is not equivalent to *nul tiel* corporation, and at all events the objection only applies to the 7th count. 1 Saund. 340; Bro. Misnomer, 22 Edw. 434; Bro. Brief, 402; 6 B. & C. 216.

In turning to the evidence, it appears to me that the plaintiffs are a legally constituted corporation in Lower Canada, under a provincial statute passed there under and by virtue of 31 Geo. III. ch. 31, and I do not think they are brought within the Bubble Act, by reason of the business proved to have been conducted by them in this province. The 14 Geo. II. applies to voluntary associations, illegal or unauthorized in their inception, or at least designed or calculated to dupe and cheat the public, and the testimony does not impute to the plaintiffs that baneful tendency, that false pretence of public good, that common grievance, that inveigling of subscribers to a common transferable stock in a baseless and delusive scheme—that assumption of corporate powers or functions—that issuing of large quantities of spurious notes or bills, which are contrary to the true intent and meaning, and which constitute the essence of illegality under the statute. The Bubble Acts are general, extending alike through all the American colonies—not local enactments specially adopted in each; and a local jurisdiction only could take criminal notice of local offences against it: the civil remedies thereby afforded are attainable

through any of the courts of any of those colonies within whose jurisdiction the party may be found, wherever the injury may have been sustained, or the right of action may have accrued. It would seem to follow, that the institution of the plaintiffs forming an exception to the Bubble Acts in Lower Canada, owing to the legality of its creation, should equally be excepted everywhere, so long at least as no corrupt or fraudulent perversion of its power exposed it to the stigma of the statute. A mere excess in particulars is not necessarily criminal under the Bubble Acts. Without a desertion of rectitude, or an infraction of those provisions of the charter which are introduced as preventives against public imposition or abuse—without being guilty of some deceit, delusion or malpractice, such as the excessive issue of spurious paper, a future violation of the terms upon which such paper was offered and received in circulation, the want of a substantial capital or adequate means of redemption, as provided by the charter, or other breach of good faith in their dealings—without, in short, departing from the guards and checks in the act of incorporation, otherwise than merely vending in this (a neighbouring) colony notes duly made and authorized to be issued at the seat of the institution, bringing in question only the technical point, how far under its constitution it could contract or be contracted with in such a course of dealing within this colony; without, I say, some such circumstances, it could not be said that a bank so created was obnoxious to the statute. It cannot be predicated universally to the association, that it had no legal authority by charter from the crown or by acts of parliament. Doubtless, in discounting the notes in suit, the plaintiffs acted to a qualified extent, through the intervention of an agent, as a body corporate; yet, since they were in truth a corporate body legally constituted for banking purposes in Lower Canada, and entitled, for all that appears, to issue at home the notes disposed of here, I do not conceive that the bank's discounting notes beyond the limits of Lower Canada, and thus promoting the circulation of its own bills through an agent in this province, is necessarily acting as a body cor-

porate in that *odious* sense manifestly contemplated in the Bubble Acts. It is not suggested that such issues formed an excess of the amount sanctioned by the charter according to the capital stock paid in and other resources in hand, or that the bank bills launched in Upper Canada were not redeemed in common with all other similar notes issued at the usual place, and according to their tenor and purport. The case is then confined to two questions: 1st. Whether the plaintiffs, on technical grounds, or upon principles of policy, are incapable of sustaining the present action in this court. 2nd. If so, whether assumpsit as for monies had and received, nevertheless lies to recover back the amount actually lent and advanced to the defendant. The plaintiffs may doubtless sue in the courts of this province for causes of action arising in Lower Canada that could be sustained there, or accruing elsewhere in the ordinary and legitimate course of their business of banking, fairly within the scope of their institution under the provincial act in evidence, as upon notes discounted in Montreal, or against the acceptor in this province, of bills drawn in favor of, or purchased by them in Lower Canada, and the like. When, however, they sue in our courts, the act of incorporation, not being a public law, of which we take judicial notice, must be stated in pleading or be proved at the trial; and when exhibited the court must look into it, not merely to ascertain that they are a foreign corporation, or a domestic one under a private charter, but also, to see that the evidence establishes a cause of action, laid and maintainable under it. The existence of individuals is presumed, and their nonentity or death must be urged as matter of defence. The existence of a corporation is not presumed, and must be shewn in *limine*, as indispensable to the plaintiffs' case. A corporation exists only in its charter, that document manifests its objects and powers, and it cannot exceed them. Whatever is incidental to all such corporations, or specially imparted by their constitution, they may legally claim and exercise, and so far (though a foreign establishment) the English courts, upon principles of comity and reciprocal and general justice, will recognize

and give effect to their contracts, and uphold and enforce their rights ; but, whenever they transgress such authority, they cease, *quoad* such excess, to be a corporation legally entitled. As respects the subject matter of such excess, they are lifeless and incapable of judicial recognition, as having any legal being or capacity. Within the scope of their charter they are a legal body, entitled to sue like individuals', beyond it, no legal existence can be attributed to them. Without departing, therefore, from the justice or liberality of adjudged cases, it may be deduced from the first principles of corporations, created by limited authority for special purposes, and with restricted powers, and from the technical rules by which in courts of law their contracts and transactions are governed, that it was not competent to the plaintiffs to establish an office of discount and circulation in this province, or to enforce in our courts the securities given for money lent by them in the course of their business in such office of discount, and whether the money so lent consisted of specie or of notes of their own, or of other domestic or foreign banks, would not materially affect the question. The plaintiffs could not as a corporation carry on their ordinary business of bankers here—the charter does not profess to authorize it. An information in the nature of a *quo warranto* would lie against the persons so acting, provided they were tangible by the process of our courts. It is an excess of authority unsanctioned expressly by, or claimable as incidental to the act of incorporation, or the corporate rights and capacity thereby conferred or flowing therefrom, upon general principles of the common law, applicable to corporate establishments enjoying local or limited franchises, all of which of modern origin must be derived from the King's charter by virtue of the royal prerogative, or from the legislature by act of parliament. If reduced to the mere question of policy, our provincial legislature have declared by the 4 Geo. IV. ch. 13, that it is inexpedient for any bank to be permitted to carry on business in this province without retiring their notes in specie within the same, and prohibited it. The expiration of this temporary act is no argument against the justness of

the sentiment contained in the preamble, for the evil may have ceased, and therefore the removal of the act rendered unnecessary. The legislative sentiment, touching the expediency of such operations, must be taken to endure until disclaimed by some future expression of opposite opinion. But, although I deem the argument of policy in itself very strong, as a general question applicable to all foreign corporation, especially when the evils that induced the passing of the Bubble acts are remembered, and the cautious checks, which for the security of the public, attach upon domestic institutions of a like kind, are adverted to, and the good policy of such guards and restrictions is contemplated, yet I conceive the objection, technically considered, supported by adequate arguments independent of considerations of policy merely.

In the last place, though I deem the securities invalid, it does not follow that the transaction partakes of that illegal or *quasi* criminal character that renders it wholly null and void. And I do not see why the plaintiffs may not well maintain their suit, as for money had and received, for the amount actually lent to the defendant.—2 Str. 1249; 2 Burr. 1077; 3 Camp. 120; 2 Taunt. 184; 1 Camp. 157; 5 Taunt. 46. The plaintiffs' bills were accepted as money, and being received in point of fact, and upon a consideration which has wholly failed the plaintiffs, it would seem to follow as a consequence that the money advanced to the defendant, and which, *ex æquo et bono*, he ought not to return, and which, no turpitude in the plaintiff, no proof of the accommodation being *malum in se* or *malum prohibitum*, prevents their reclaiming—the action for money had and received lies. The undertaking to pay is an implied promise in law, requiring no proof of a contract to do so, and this takes it out of the technical difficulty which operates against the notes declared on; and no argument of policy is prevailing to shew, that as against the party who actually received the plaintiffs' bills as money, and which passing current as money were of equivalent value and advantage to him, an action is not sustainable to recover back the same. I regard the securities and indeed the

whole transaction of discount and accommodation as void, for want of legal capacity in the plaintiffs to engage in such business here, or to enter into any such contracts in this province; but I am not prepared to say, that I deem the whole illegal, for if so, I should be constrained to hold the present action unsustainable on any ground. When the contract is merely *void*, the consideration may be recovered back; when *illegal*, as being against the common law on the score of immorality, or upon general principles of public policy, or against the provisions of the prohibitory or penal statutes, no action lies to recover back advances after the same has been executed. Reimbursements can in such cases only be compelled by taking advantage of the *locus penitentiae* that is sometimes afforded while the matter remains executory. I regard the present as void at common law for want of legal capacity in the plaintiffs, but do not find that the attempt of an existing domestic or foreign corporation to exceed the scope and authority of its charter, in lending money, so obnoxious to the charge of illegality (although unauthorized) as to deprive them of the power to recover back, as money had and received, to their use the sum actually advanced by them.

It was finally determined by the court, that the verdict should be reduced to the amount of money actually received by the defendant himself in the course of these transactions, but that if the parties could not agree as to that sum, they made the rule for a new trial absolute, with costs to abide the event.

DOE BROWN V. FRASER.

A new trial on the grounds of the discovery of new evidence, was refused, the affidavits not being sufficiently explicit, and the court stating that the defendant could bring an action to recover back possession if his evidence could establish his title.

Ejectment for Lot No. 4, 6th concession Mountain. The lessor of the plaintiff made title at the trial at the last assizes for the Eastern District, *coram Sherwood, J.*, by producing a patent to himself for these premises dated in

December 1802. The defendant relied on endeavouring to prove 20 years' possession adverse to the plaintiff, but failed, and in the course of the evidence a bond was adverted to, as having been given more than 20 years ago by the lessor of the plaintiff to the defendant's father; but the bond was neither produced nor accounted for. The plaintiff had a verdict. In Michaelmas term last *Sherwood, H.*, obtained a rule nisi for a new trial, on the ground of the discovery of new evidence since the last trial. The defendant made affidavit that since the trial he had discovered testimony by which he could clearly shew that both he and his father, under whom he claimed, had been in actual possession of the premises, without acknowledging in any way any title in the lessor of the plaintiff, for more than 20 years before this action was brought, and that he was confident that he should be able to produce such evidence at another trial. *Draper* shewed cause.

Per Cur.—If a bond had been produced more than 20 years' old, the question would have been, whether it could be left to the jury to presume the condition complied with, and a deed given, where there had been no possession to support, or to be supported by such a presumption. What the new evidence is, is not enough explained, nor why not given before. If the defendant can give such evidence as will make out a good title by twenty years' possession, he can become plaintiff in ejectment; but on the evidence given, and on the affidavits filed, we should not be warranted in directing a new trial.

Per Cur.—Rule discharged.

TEAL V. CLARKSON.

Where the defendant purchased land and obtained the same, in payment whereof he gave notes payable in work, at fixed prices—*Held*, that it was incumbent on him to tender the work to the plaintiff, and that an action would be sustained to recover the amount of such notes in money, without proving a specific demand of work, or a refusal by the defendant to perform such work on demand made.

Assumpsit. 1st count on seven notes, stating, that in consideration of plaintiff selling to defendant a term of years unexpired in certain lands, &c., defendant undertook to do,

or cause to be done, work for the plaintiff to the amount of fifty dollars, within twelve months from date, (each note bearing date one year after the preceding one), and averring requests within each year, to do certain work pointed out to the amount of fifty dollars, and defendant's refusal. 2nd count, that in consideration that defendant was indebted to plaintiff in the sum of 87*l.* 10*s.*, (not saying on what account), the defendant undertook, &c., (as in first count), setting out the seven notes or agreements and requests, to work as in the first count, and refusal. 3rd count, like the first, except that no particular requests to do work is averred but only *sæpius requisitus*, &c. 4th count, the same as the 2nd, except in averring a particular request. Then follow four counts on each note or agreement—two similar in form to the first and second—the other two, to the third and fourth counts. Then a count, that on 1st January 1835, defendant was indebted to plaintiff in 100*l.* for land, bargained and sold by the plaintiff to the defendant for the remainder of a certain term of years, and being so indebted, promised to pay the 100*l.* when requested. Then an account stated.

Non assumpsit was pleaded to the whole declaration.

At the trial, before the Chief Justice at the last Home District Assizes, it was proved that the plaintiff having sold to the defendant an unexpired term in a reserve lot of land for 350*l.*, took the seven notes declared on, being each for 50*l.*, *payable in work in twelve months from the date* of the notes respectively. Within the first twelve months, the plaintiff demanded of the defendant to cut up the wood on a certain quantity of land into cord wood, and offered 1*s.* 6½*d.* per cord, which it appeared was too low a rate; the defendant not only refused to do the work at this price per cord, but declared he would not cut it by the cord at any price, and insisted upon labouring by the day. To this the plaintiff would not assent, and no work was done. Both the parties insisted upon something specific, for which they had no warrant in their agreement. Some evidence was given to shew that the defendant had boasted of his management, in avoiding, upon various pretences, the calls made upon him to do the work which he was bound to

perform to the amount of the notes ; and he contended at the trial, that nothing but work could be exacted of him, and that the opportunity of applying the labour in the plaintiff's service had never been afforded him. It was proved that after the notes became due the defendant expressed a readiness to pay the amount in grain, or to render back the farm on receiving payment for his improvements. The jury found for the plaintiff for the amount of the notes without any interest.

In Michaelmas term last, *Bidwell* obtained a rule nisi to set aside this verdict and grant a new trial, on the ground that the verdict was contrary to law and evidence, and insisting also, that the plaintiff was bound to have proved that he provided work for the defendant to do, and that the defendant could not be called upon to pay otherwise than in work.

ROBINSON, C. J.—The question before us, which was also urged at the trial, is whether the plaintiff is entitled upon the evidence to recover the amount of these notes, without shewing that he gave notice to the defendant of certain work which he would accept in payment, and the affording him no opportunity to pay in labour according to the contract. At the trial it appeared to me that the plaintiff was entitled to recover, but I recommended the jury not to give interest, unless they were of opinion upon the evidence that it was the fault of the defendant solely that the work had been unperformed. They found for the plaintiff the principal sum without interest ; and having examined the question since the trial, I think the plaintiff was properly allowed to recover.

The declaration is carefully framed to meet the case. The objection turns upon the necessity of shewing a notice from the plaintiff to the defendant to do certain work, and a default in the defendant, before the plaintiff can sue for the wrong. The authorities which bear upon the question do not support the objection, but, in my opinion, establish the contrary. They establish this principle, that when the obligation or condition takes its rise in a precedent debt or duty, and where the undertaking is to deliver stock, do

work, &c., on a given day, in satisfaction of such debt, then it is at the peril of the obligor or person promising to discharge his undertaking. And even when his engagement is contingent upon an event lying particularly within the knowledge of the other party, to which he is not privy, he must nevertheless acquire information of the event as he can, and he must at his peril acquit himself of his undertaking. Notice to him is not necessary, nor a special request, unless the undertaking is to perform upon request. The person stipulating in such a case must offer, and if he has offered to deliver the stock, and it was not accepted, he is not acquitted of the debt, but must aver his readiness still to perform by reason of the precedent debt. Here there was evidence, however, of a request to work on the one side and a refusal on the other, though, to be sure, neither the one nor the other was made in the terms, nor rested upon grounds warranted by the agreement. The days are gone by when the defendant undertook to pay in work—the work has not been performed—the defendant has not offered to perform it, and the debt is still due which the plaintiff had consented to receive in work, and the plaintiff, in my opinion, is entitled to recover upon the notes as evidence of a debt now due in money. Sand. 33, a (n. 2); Co. Lit. 210; Cro. El. 73; Dyer, 25; 12 Mod. 444; 2 Mod. 304; 6 Mod. 200; Bull. N. P. 162; 1 Sal. 138; 1 Ld. Ray 620; 2 M. & S. 320; 4 Leo. 46; 12 Mod. 421.

SHERWOOD, J., and MACAULAY, J., of the same opinion.

Per Cur.—Rule discharged.

HULL V. ALWAY.

Submission by bond with a day limited for making the award—on the last day in fact, the arbitrators were ready to award, but at defendant's request put it off, to enable him to produce further evidence—all parties, however, supposed that the time fixed by the submission would not expire till the next day. The next day the arbitrators heard both parties on oath, and made an award about an hour after midnight. *Held*, that assumpsit on a parol submission was maintainable to recover the sum awarded, and that the extension of the time operated as a parol submission.

Assumpsit on an award. The first count of the declaration stated a mutual submission to three arbitrators of all matters in difference, not alleging that any time was limited

for making the award. It then sets out that an award was made in writing under the hands of the three arbitrators on the 4th November, 1834, directing that defendant should pay to the plaintiff 237*l.* 10*s.*, in three equal instalments at periods which are specified, in full satisfaction of the matters in difference. The action was brought for two instalments which had fallen due. The second count declared that defendant was indebted in 300*l.*, on an award made by the same three arbitrators, upon and by virtue of a certain submission before that time made by plaintiff and defendant to the award of the said arbitrators of and concerning all matters in difference between plaintiff and defendant, and upon which reference the said arbitrators awarded that defendant should pay a certain sum of money, as the sum last mentioned, &c. There was also a count upon an account stated. Plea: the general issue.

At the trial at the last assizes for the Home District, the following facts appeared. On 4th October, 1834, the parties executed bonds of submission to the award of three arbitrators. All matters in difference were referred, and the condition of the bonds required "that the award should be made in writing under the hands of the arbitrators, and ready to be delivered to such of the said parties as they should find their award for, *within three days from the thirty first day of October, aforesaid.*" The parties had had transactions with each other, or together, respecting the buying up of U. E. rights to land; and, among the matters submitted, it appeared (though that was not proved by strictly legal evidence) there were bonds given, with conditions to secure the transfer by one to the other of portions of the land so purchased. The parties went before the arbitrators and were heard, and evidence was received. As the award was to be made within three days from the thirty first day of October, it could not consistently with the submission be made after the 3rd November, which fell on a Monday. On that day, the arbitrators having spent much time in investigating the matters in dispute, were prepared to make their award, and were proceeding to do so, when at the particular request of the defendant, they adjourned to the

following day, 4th November, in order that he might have an opportunity of producing a witness who resided at a distance. The arbitrators, when the defendant made this request, expressed an apprehension that they would not be in time after the 3rd; but, on consultation among themselves, and on advising with the parties and others, it was concluded that the intervening Sunday, (the 2nd November), was to be left out of the calculation, as a *dies non*, which would make them to be in time on the 4th. They accordingly met again on the 4th, both parties assenting, and being present they heard the defendant's witness, and examined both the plaintiff and defendant on oath, in respect to their mutual dealings. They then determined the case, and publicly announced their decision; but, from a difficulty that occurred in getting their award drawn up in regular form, they did not execute it till after midnight, or about one o'clock, a. m., of the 5th November. It was made under the hands and seals of the arbitrators, it recited the submission, and was dated the 4th November, and directed that the defendant should pay the plaintiff 237*l.* 10*s.* by three instalments, as stated in the declaration, to be in full satisfaction of all debts, dues, demands, &c., due to the plaintiff upon any account whatever, at any time previous to the entering into the bonds of submission recited in the award. Mutual releases were also ordered to be given. The day after the award was made it became known that it was not in fact executed till after midnight of the 4th November, and it was submitted that on that account it was not good, for all parties seemed to be under the impression that the 4th was in time, being the last of the three days excluding Sunday. Apprehending that it might be invalid from not being signed until the 5th, the plaintiff was willing to have gone to another arbitration; and it was proposed to the defendant by one at least of the arbitrators to open the matter again for that purpose, but he positively declined, saying he would let the award rest as it was, or to that effect.

The jury found for the plaintiff for the two first instalments.

In Michaelmas term last *Sullivan* moved to set aside this verdict, and enter a nonsuit or for a new trial, objecting that this award could not be enforced under all the circumstances, and that the plaintiff could not recover on the present pleadings.

The *Solicitor General* shewed cause. Judgment was now given.

ROBINSON, C. J.—Although the award is expressed to be made under the bond of submission which it recites, it is clear that no remedy lies upon the bond, because the time limited in the condition had elapsed, and there was no agreement under seal to enlarge it. The defendant maintains that they are not only without remedy under the bond, but that the award is absolutely void and cannot be enforced by an action in any form. He argues, and so far correctly, that if it could be enforced it could only be by treating it as made under a parol submission, and he urges that it cannot be upheld on that footing—1st, because it was shewn that the arbitrators considered and decided upon bond debts which they could not legally do under parol submission—and 2nd, that at any rate the parties cannot be held to this award, because it is clear they all along intended to proceed under the bond, and to keep within it, not agreeing to enlarge the time, nor contemplating any enlargement; that the remedy on the bond being lost, the plaintiff cannot set up any new independent submission, because there was none in fact, but merely an error in the first place in supposing that an award made on the 4th would come within the bond; and in the next place, if this idea had been correct, there was a clear exceeding of their power by the arbitrators, in not executing their award until the 5th November. His main argument is, that the parties must stand or fall by the submission under seal, because they did not intend to go beyond it; and if the remedy under that submission has been lost by any means, the loss cannot be repaired by setting up a supposed independent reference.

With respect to the first ground of the defendant's objection, it cannot be maintained, because, admitting that he had shewn by proper evidence at the trial, that debts had

been admitted accruing upon bonds with conditions to convey lands, similar to that of which a copy was produced, the authorities seem clearly to support the principle, that a demand of that kind, not being simply a debt accruing on a specialty, but arising out of the breach of a condition to do a collateral thing, may be repaired by parol submission, as well as by deed. Upon the other ground upon which this action is resisted—namely, that the intention of the parties was to proceed upon the submission bond, and to keep within it, from which intent the defendant argues it must follow, that no other submission can be resorted to, and that the remedy by bond failing the award falls to the ground—the misapprehension of the parties with respect to the time has produced a peculiar case, which we must decide by reason and upon principles, for we cannot expect to find express authority. In looking to what is just between the parties, it is to be observed on the one hand, that as the bond has lost its force, the parties have lost the advantage of this higher remedy and have also lost the advantage of being able to obtain relief under the statute against any improper conduct of the arbitrators. As to the first of these considerations, it applies only in prejudice of the party who has the award, and his having lost the higher remedy, can constitute no good reason in the mouth of this defendant why he should loose all remedy. The other point certainly has more weight in it ; but, in the first place, we are not warranted in surmising partiality or corruption in the arbitrators, and in the next place, it does not seem to be a point clearly settled, that the defendant may not avail himself of matter extrinsic as a defence to an action of assumpsit on the award, such as want of due notice on the part of the arbitrators, or refusing to hear evidence, when it was not competent to him to move the court to set it aside.—1 Esp. N. P. C. 377. On the other hand, when it is remembered that the award was about to be made on the third, and that the postponement was expressly at the request of the defendant—when it is considered also, that upon the examination of the parties which followed this postponement, disclosures and admissions may have been made in the full faith of a

final settlement, which would otherwise have been withheld, there is certainly strong ground in justice for holding the defendant to this award. But the question is not merely whether it is just, but whether it is legal to allow a recovery upon it in this form of action. The award recites the submission by bond, and it is evident the arbitrators imagined their award might be sustained under that submission, and intended that it should be, still it is clearly not within the submission because not made in time. That they were in error in their recital is certain, but that will not invalidate their award, if it is capable of being sustained on another ground than that set forth in their recital.—12 Ea. 81.

Where parties having entered into bonds of submission agree to enlarge the time, but omit to execute a writing under their seals to that effect, it is evident that an award made within such enlarged period cannot be enforced under the bond, because of the want of the seal to the subsequent agreement. The case of *Brown v. Goodman*, 3 T. R. 592, is of this description, but there the court by no means expresses the conclusion that the award is not binding; on the contrary, Lord Kenyon says "the question was not then to be discussed whether the party had not some remedy, but whether his remedy lay on the bond."—2 B. & C. 185. And in a more modern case, the court adverting to this case, expressly assumes that the party had a remedy, as upon the breach of a parol contract. Now, in comparing the case of *Brown v. Goodman* with the present, we cannot fail to see that in both cases the intention was to keep the bond in force, and the only peculiarity in the case before us is, that although there was a delay at the request of the defendant, and to serve him, yet there was in fact no intention of enlarging the term set in the submission, but all parties proceeded, imagining they were still within it. For the defendant it is urged, that as the arbitrators and parties conceived they were acting under the conditions of the bond, and meant to keep within in it, they cannot be held consistently to have waived that submission, or to have agreed to enlarge the term; and that in the next place, the parties

at any rate all thought they would be in time on the *4th November*, and not afterward, and had no intention of going beyond that day, but that the award was really not executed till the 5th. On the part of the plaintiff it is answered, that there was a common error which can have no other effect than the cancelling the bonds—that in fact the arbitrators were clearly limited to the 3rd November, which fact both parties had an equal opportunity of knowing, and were equally bound to know—that both parties did in fact however, go before the arbitrators after that day was passed, and submitted their disputes to their judgment, with the view of being bound by their award; and that from this conduct of the parties, a submission may be inferred as clearly as from any writing. As to the award being made on the 5th, it is answered, that when the arbitrators, at the request of the defendant and to serve him, went beyond the 3rd, there was no absolute stipulation that the award should be made on the 4th, it was merely intended that it should be, because it was conceived that by doing so the obligation of the condition would be preserved, but that when it turns out that such impressions was erroneous, there no longer remains a reason for holding the arbitrators strictly to the 4th, and as no such stipulation was expressed, it is against reason to infer it.

In my opinion the arguments for supporting the award cannot be satisfactorily answered, and the verdict I think should be sustained. When the defendant asked the indulgence which led to the adjournment, he was as much bound to know as the other what would be the legal consequence of granting it, and he ought to abide by all those consequences. If, by obtaining the delay he asked for, he took his case, though unwittingly, out of the bond of submission, he must submit to the consequences, if it be any disadvantage to himself; and he surely can have no right to say to the other party “the arbitrators by granting me this indulgence have annulled the bond between us, and therefore, as you cannot hold me to the award under that, I protest against being liable at all; and because you have lost the advantage of the bond for enforcing the award, you shall

sustain the further injury that the award shall be utterly invalid, and shall not even form a ground of action against me in the equitable remedy of trespass on the case, notwithstanding my actual consent to the arbitration proceeding after the time which the bond allowed."

I can see no solid distinction between this case and the one I have already referred to, where it was intended to enlarge the time by a writing endorsed on the bond, which was done informally. There, doubtless, the parties intended to act under the bond; and though that intention failed from an accidental omission, still the award is upheld, though the remedy on the bond is lost. There is this difference certainly between the two cases, that in the one it is intended to enlarge the time originally limited; in this case that was not intended, because it was not conceived to be necessary; but both parties did agree to submit their disputes and to have them examined into and awarded upon, on a day which was in fact after the day to which they were bound; and I can see no reason why the assumpsit to pay the money awarded, which is in general inferred from the conduct of the parties in going before arbitrators, should not arise in this case. There is no proof offered and no surmise advanced of any improper intention or partial conduct in the arbitrators; nor is it now attempted to be shewn to us that both parties were not fully and fairly heard and justly dealt by in the award. It is moreover very material, that when the plaintiff intimated his willingness to waive this award, and resort to another arbitration, the defendant declined. He knew then the full extent of the objection as to the time, and having this knowledge, the principle stated by Chief Justice Dallas, in 8 Taunt. 696, in my opinion fairly applies to him.

SHERWOOD, J., concurred.

MACAULAY, J.—Doubtless all parties meant to act, and thought they were proceeding under the bonds of submission; yet in truth, the time having expired, they could not do so. All were cognizant of the facts, but they erred in construction of law upon those facts; and it is a general rule, that ignorance of the law with knowledge of the facts

will not avail a party to undo that in which he has concurred. The making of the award was deferred at the request of the defendant, and after it was made he expressed his inclination to adhere to it in preference to another reference. By continuing the reference after the time limited in the bond had expired, the parties virtually and by their acts and conduct extended the time; both were assenting to the reference until the actual execution of the award; and after the expiration of the time mentioned in the submission the conditions of the bond would constitute and afford evidence in writing of the terms and nature of the submission, though they would not constitute a submission in writing. It is analogous to the verbal extension of a written lease for year's upon the terms embraced therein. The submission was continued upon the original terms, and I do not find that bonds for collateral purposes being included invalidates the award. There is certainly room for much argument, but in accordance with the apparent justice of the case, this seems to me the most satisfactory view of it. The period was extended at the request of the defendant; he did not object at the time, and after the award was made he expressed his disposition to adhere to it. The submission, if continued, was evidence in writing, though not strictly a written submission.

Vide—3 M. & P. 629; 1 R. & M. 17; 7 Price, 636; 8 T. R. 87; 5 Ea. 13; 2 Keb. 623, 659; 1 Sid. 160; 3 D. & R. 446; 2 B. & C. 179; 2 T. R. 645; 1 M. & S. 21; 3 T. R. 591; 1 Moo. 36; 1 Lev. 113; 7 T. R. 1; Barnes, 54; 17 Ves. 421; 6 Mon. 488; Dyer, 51; 1 Roll. 264, 130; 3 T. R. 592; Willes, 270; 6 Co. 44; 9 Co. 73; Cro. Jac. 79, 447, 649; 2 Ld. Ray. 1044; 2 C. & P. 574; 1 Lev. 292; Ab. 5; 1 Roll. 270; 1 Ea. 627.

MILLS V. MONGER.

In trespass against a magistrate for false imprisonment and seizing and selling goods and chattels, where he suffers judgment by default, it is unnecessary for the plaintiff to prove that he gave notice of action or commenced his suit within six months.

Trespass for assault and imprisonment, and for breaking

and entering a stable of plaintiffs' and taking out two horses, against which plaintiff had a charge as an inkeeper for their keep, and for entering his dwelling house and taking out a clock and converting it. The defendant appeared and suffered judgment by *nil dicit*. At the assessment of damages it was proved that one Crippen had two horses and a groom attending them, kept by the plaintiff who was an inkeeper, upon a certain agreement as to price and periods of payment—that after a time he decided to take away his horses, but his servant was resisted by the plaintiff, who claimed a right to detain them until he was paid for the keep. The groom, in consequence, went to defendant who is a justice of the peace, and made complaint on oath of this forcible detention of the horses by the plaintiff, and the defendant gave him a warrant directed to a bailiff, reciting the complaint on oath, that “plaintiff had forcibly detained two horses the property of Crippen, and would not let them go though requested so to do, until he was paid the keeping for the horses and groom, contrary to the agreement made and in violation of the law,” and commanding the bailiff to apprehend the plaintiff and bring him with the horses before defendant to answer to the force and damage. The plaintiff being brought before the defendant on this warrant, was convicted upon the evidence of the groom of what the defendant assumed to be a trespass to personal property, punishable in a summary manner under the Petty Trespass Act, 4 Wm. IV. ch. 4. The record of conviction, under the hand of the defendant, states, that plaintiff was convicted “for that he did on, &c., at, &c., detain with force from the possession of Abraham Crippen two horses for their meat, contrary to a bargain made between the said parties, and would not let them go but kept them till they were delivered by warrant, and it is adjudged should pay 18s. to Crippen for his damages, and 1*l.* 2*s.* 3*d.* for costs, in ten days from the date, and that in default, then to be levied on the goods, &c., of plaintiff the said sums; and in case there shall be no goods, then that plaintiff on return of the warrant, shall be imprisoned in the common gaol for one calendar month, unless the money shall be sooner paid.” A few days

afterwards the defendant made his warrant to a constable, reciting the conviction and that plaintiff had refused to pay the money, and authorizing the constable to levy it of the goods of plaintiff. Under this warrant a clock was seized and sold by the constable for a small sum, being bid in by plaintiff or for him. For this and the taking plaintiff prisoner, and keeping him for two or three hours in defendant's house on occasion of the conviction, the action was brought.

On the part of the defendant it was objected—1st, That plaintiff should have given defendant a month's notice of his action. 2nd, That he should have shewn the action to have been brought within six months. 3rd. That under our statute 2 Wm. IV. ch. 4, the action should have been case and not trespass, and that 1s. damages only could be recovered, because the plaintiff has not averred malice and want of probable cause, and that consequently only nominal damages could be recovered. The Chief Justice directed the jury to assess damages for the injury, reserving leave to the defendant to move to reduce them to nominal damages, in case the court should be of opinion that the defendant under the facts of the case, was entitled to protection as a magistrate, and that after judgment by default he could have this benefit from his exceptions. The jury gave the plaintiff 15*l.* damages. And in Michaelmas term last *Draper* obtained a rule nisi, to reduce this verdict to nominal damages. The *Attorney General* shewed cause.

ROBINSON, C. J.—As to the third point, it is given up in argument as clearly not sustainable. The 4th section of 2nd Wm. IV. ch. 4, cannot apply to a case of this description—for, 1st, the guilt of the person convicted is not manifest—the error is one of substance, and not form; and 2ndly, the conviction has not been quashed—there is a conviction in full force not quashed, but so clearly bad in substance on the face of it, as to be no defence to the justice against an action of trespass.—16 East. 21. This is not a case in which the provision now alluded to can apply. As to the other points, it has been argued that the justice was entitled to no notice of action, and that it was unnecessary to shew the action to have been brought within six months,

because his conduct in this case was so wholly apart from his duty, and so clearly unauthorized by his powers as a justice of the peace, that the act cannot be treated as an act done by him in his capacity of a justice, but a bare naked trespass, in which he stands unprotected by any statute. I have examined the cases cited for the defendant, some of which only are material, and I have looked into such other decisions as have taken place on this question, or rather upon questions arising in England under statutes affording similar protection to justices of the peace ; and in my opinion, this defendant, if he had pleaded, would have been entitled to the benefit of the exceptions which he has urged, both in regard to notice of action and proof of the time of its being commenced. The cases are hard to reconcile with each other, but I have seen none which would warrant us in holding the defendant in this case to be out of the protection of the statute.

The act 4 Wm. IV. ch. 4, for the punishment of petty trespass, enacts, "that if any person shall wilfully or maliciously commit any damage, injury or spoil to or upon any real or personal property, &c., every such person being convicted before a justice of the peace, shall forfeit and pay such sum of money as shall appear to be a reasonable compensation for the damage, injury or spoil so committed, not exceeding the sum of 5*l.*, to be paid to the party aggrieved : Provided, always, that nothing herein contained shall extend to any case where the party trespassing acted under a fair and reasonable supposition, that he had a right to do the act complained of," &c.

The 21st section provides that all actions, &c., against any person, "for anything done in pursuance of the act, shall be commenced within six calendar months after the fact committed, and notice in writing of such action and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action ; and in any such action the defendant may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon : And no plaintiff shall recover in such action, if tender of sufficient amends shall

have been made before such action brought, &c. Upon verdict for defendant, or if plaintiff shall be nonsuited, or shal discontinue, or if judgment be given for defendant upon demurrer or otherwise, defendant shall recover his full costs, as between attorney and client," &c.

The British statute 24 Geo. II. ch. 44, extends similar protection to justices of the peace when actions are brought against them "for anything done by them in the execution of their office." The defendant in this case professed to be acting as a justice of the peace ; and therefore, if our provincial statute just recited contained no provision on this subject, we should have to consider the case with reference to the general protection extended by the British statute. But on this occasion we have nothing to do with the 24 Geo. II. ch. 44. Our own legislature has determined how far the justice shall be protected while acting under this statute, and we must be governed by their express provision, and not extend indulgence to a greater or less degree than they have granted it. Then our statute gives the protection in actions brought "*for anything done in pursuance of the act,*" which has the same effect as the expression of the British statute, "for anything by them done in the execution of their office." The one expression applies to the general duties of a justice, with the same and no greater latitude, I think, than the other does to his duties under the particular act in which the expression is used. Upon the British act many cases have arisen, when it was made a question whether by reason of the manifest illegality of the act done, the justice "could be treated as acting in the execution of his office ;" and this is in effect the same question as arises under this act, when the doubt is raised whether he should be treated as acting "in pursuance of the statute." The cases under 24 Geo. II., therefore, I regard as authority to guide us in the application of cases to our own statute ; the same reasoning holds. "Execution of his office," means "execution of the duties of his office." And when a justice, professing to act in his judicial capacity, does anything manifestly contrary to his duty, he can with no more propriety be said to be acting in the execution of his office,

than a justice can be said to be acting in pursuance of this statute when the thing done by him is contrary to the statute or unwarranted by it. Therefore I consider a similar rule of construction must be given to both these expressions. Now, here this defendant, having jurisdiction as a single magistrate to convict and punish for any damage, injury or spoil, wilfully or maliciously committed to or upon any personal property, is applied to for a warrant by a complainant, who states that his horses are illegally and forcibly withheld from him. He seems most strangely to have confounded the idea of an injury committed to or upon the articles of property, with an injury committed against the owner's right of property, and he issues his warrant for a trespass upon a complaint which stated a wrong of another nature—namely, a tortious detention of property—and he proceeds to convict for the trespass, awarding moderate damages, and directing a levy thereof by warrant &c. I am surprised he should have fallen into this error, because the distinction seems obvious; but as no previous malice was suggested, and no ground has appeared beyond the mere act done, for imputing any design to injure, I believe it to be very possible that his was an error of the mind only; and I dare say that he may have been misled first, from failing to notice the distinction I have already adverted to, and then by considering that the act, in giving the sum awarded to the party in compensation for the damage for the injury committed, meant to enable the justice to settle summarily such injuries as that complained of. The proviso at the end of the 6th clause, probably, also contributed to confirm him in his erroneous view of the object of the act. It declares that the act shall not extend to any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of. As he recites in his conviction that the forcible detaining of the horses was contrary to the agreement of the parties, he seems to have drawn the inference that the defendant could have had “no fair and reasonable supposition that he had a right to do the act complained of;” but he should have remembered that because the defendant

did not come within this exception, it did not therefore follow that he came within the act. Any lawyer must have seen, and one would have supposed that any man of tolerably acute mind could scarcely fail to see, that the forcible detention of property was not a damage, injury or spoil to the property, but a damage to the owner in respect of his right of property; and the defendant in this case must have been inattentive, or a man whose judgment cannot safely be trusted to, if he really fell into the error which I suppose he did; but, a justice of the peace, though it is most desirable he should have all necessary qualifications, is not bound to be a lawyer or a man of science, nor is he bound at the peril of all consequences to be a man of acute mind, and strong judgment; he is bound to exercise his judgment in good faith—to do as well as he can—and then if he errs the law gives him protection to a reasonable extent. A justice who is authorized to convict for selling spirituous liquors without license, might very innocently imagine some compound to come under the term spirituous liquors, which any chemist, or perhaps almost any intelligent man, would at once pronounce not to deserve that name. So again, if a justice had power to punish summarily for petty theft, he might adjudge a case to be larceny which any lawyer or almost any person of sound judgment would consider to be a breach of trust, or a mere trespass; but in any case of this kind the law intends that the justice shall not inevitably suffer the consequences of a vexatious action, when he really fell into a mistake, however palpable—it means to give him the opportunity of tendering amends, after he has notice of the wrong imputed to him, and before he can be prosecuted for it. The more stupid and gross he discovers his error to be, the more likely he will be to take this step, and the more certain it is that he requires the protection; while, on the other hand, it cannot be said that he does not deserve this protection, so long as there is reason to apprehend that he does wrong from inadvertency or infirmity of mind only, and sincerely desiring to do right.

In the case before us, the magistrate acted within his jurisdiction as to locality. In regard to the subject matter, he had jurisdiction to punish for a trespass to personal

property. If the act complained of had been in fact a trespass to personal property, or rather a damage or injury committed to or upon it, then he had full authority to act as he did. It seems to me that he did conceive the facts stated to establish a case of trespass under the act—that his error lay in that—and consequently, that the injury he committed sprung from that error. If I could say, that in my opinion the defendant could not *possibly* have imagined he was acting in pursuance of the statute, then there are cases that bear decidedly against the necessity of notice, but I cannot say so—indeed my conviction is otherwise. I have no good ground for saying it was otherwise than an error in judgment. In *Graves v. Arnold*, Sir James Mansfield uses this language: “If the defendant acted under color of the statute, and believed himself to be exercising the powers conferred by it, notice will be necessary, although by virtue of the statute he might not be justified in what he did.—9 D. & R. 339; 2 Esp. Ca. 542; 2 H. Bl. 114, 353; 9 Ea. 344; 3 M. & S. 582; 9 B. & C. 309; 6 B. & C. 351; 3 Camp. 242.

But, except for the general interest which belongs to a question of this nature, it was not necessary to have gone particularly into the consideration of it; for I agree with my brothers, that upon the 21st section of the statute 4 Wm. IV. ch. 4, the plaintiff is under no necessity of proving notice of action, or of shewing that it was commenced in time, when the defendant does not plead, but suffers judgment by default. It is evident that the different nature of the provision in that clause, from the enactment in 2 Geo. II. ch. 23, section 23, respecting the delivery of an attorney's bill before action brought, prevents the same effect from being given to both. The case, therefore, of *Ridout v. Brown*, decided in this court, which, upon the first impression, I thought might have been applicable, is clearly not so when this statute is considered; and, as the defendant, by allowing judgment by default, has lost the benefit of the exception raised by him, the plaintiff must, I think, have judgment.

SHERWOOD, J., and MACAULAY, J., of the same opinion.

Per Cur.—Rule discharged.

FRASEE ET UX. V. RICHARDSON.

In an action of dower *unde nihil habet* the writ of *grand cape* must be served fifteen days before the return.

Motion in this case was made to set aside the service of the writ of *grand cape*, which was issued against the lands of defendant upon his default on the first process, which had been sued out against him in an action of dower *unde nihil habet*. The irregularity complained of was, that the *grand cape* was not executed fifteen days before the return.

Cawpbell, E. C., for demandant; *Richardson* for tenant.

ROBINSON, C. J.—I am of opinion that the rule must be made absolute. This is not a mere matter of form—the intention and object of the process render it necessary that it should be served a considerable time before the return, and fifteen days is the period established and required by law. The oldest authority on this subject is Glanville, who says, in treating of real actions, “*Summonitus autem ad diem præfixam, aut venit aut non—aut nuntium aut essonium mittit—adversarius ejus qui petit, adversus eum die statutâ coram justiciis appareat, et se adversus eum liti offerat et ita in curia per tres dies expectabit. Si vero nec quartâ die venerit, apparentibus summonitoribus, &c., iterum per aliud breve summonebitur per intervalla quindecim dierum ad minus, &c., et si non ad tertiam summonitionem non venerit neque miserit capiatur tenementum in manum domini regis et ita per quindecim dies remanebit. Et si infra illos quindecim dies non venerit, adversario ejus adjudicabitur seisina, &c. Si vero infra illos quindecim dies venerit &c., præcipietur ei, &c.*”—Lib. 7, ch. 7. Of course, without the actual seizing of the land by the sheriff, it could not be known of what lands the tenant or defendant was to lose his seizin, in the event of his default; and the law required that he should be constrained to appear, by the notorious act of seizing his lands into the King’s hands fifteen days at least before he should be required to appear, thereby giving him sufficient notice of what he was to do, and warning him in time of the consequences of his default. In the time of Henry III., it seems the law was so far altered, that the *grand cape* was issued after the first

summons, whereas, in Glanville's time, there must have been default upon three writs of summons.—1 Reeve's Hist. Com. Law 405.

In the case of *Phelan v. Phelan*, this court had occasion to enter particularly into the consideration of the process and proceedings in the action of dower. It did not become necessary to determine any question respecting the execution of the *grand cape*, but it was stated by the court in that case, that until the legislature prescribed some other mode of proceeding, that which is practised in England would be adhered to; and it is clear that the practice in respect to the service of this writ requires it to be as the tenant in this case states it. The seizing the land by the sheriff is merely formal—the tenant is not for the time dispossessed, but the writ is to be executed formally in the manner pointed out in the books of practice, and the party summoned according to the command in the writ; and this must be done fifteen days before the return of the writ.—Com. Dig. Process D. 4; Fleta. I. 6. c. 14; Fitz. N. B. 178; Imp. Sher. 300; Watson Do. 234.

SHERWOOD, J., and MACAULAY, J., agreed.

Per Cur.—Rule absolute.

HALL V. FERGUSON AND DUFFY.

Where an award is legal on the face of it, and consistent with the submission, the court will not look *dehors* the award itself, or matters incorporated in and with it, to sustain an objection that the arbitrator has mistaken the law; particularly, if all matters in law and equity are submitted, although the court may doubt as to the soundness of the principles on which the award may seem to rest.

The court will look into papers delivered simultaneously with the award, and which refer to and are intended to be explanatory of it, as forming part of the award itself.

This case came before the court on a motion to set aside the award of umpirage made between these parties. The controversy arose upon the contract set forth in the following letters:

Peterborough, 26th May, 1834.

JOHN HALL, Esq.,

Dear Sir,—With reference to our conversation a few nights ago, and to guard against accident, to which we are all liable, we are desirous of putting on paper the heads of our mutually verbal understanding at that time, trusting that it may meet your approbation,

and that our respective signatures shall be exchanged to the same. We consider that you have sold, and that we have purchased the whole of that part of your freehold property, commonly called the mill property, consisting of twenty acres of land more or less, with a good clear and indisputable title to the same, including all and every the buildings thereon, and the full water privilege as granted and guaranteed to you (or those connected with you) by government; also, all the right and title you now or may possess to that portion of land with the buildings thereon immediately adjoining the mill property, and extending from it along the bank of the river to the house or inn occupied by Mr. McFadden at present, included.

The full and total amount of the purchase money in the first instance is 8500*l.*, currency, for the property, as set forth understood and described, payable as follows, that is to say, 1750*l.*, currency, to be paid and receipts exchanged on possession being given; 1000*l.* in cash, and 750*l.* lent by Mr. Duffy, (a party hereto), to be considered as such. A claim or lien on the property held and possessed by a Mr. Tyler of New York, amounting in the whole to 3600*l.*, to be paid in three years from the 1st May, 1834, if insisted on by Mr. Tyler, or his assigns, representatives, &c.; this reservation made in consequence of a doubt existing as to whether a portion of this sum, say 1300*l.* is not, or can be made payable in five years from 1st May, 1834, instead of the whole in three years. Any balance remaining after the provision set forth to be paid in equal annual instalments, commencing, as the case may be, in three or five years from the 1st May, 1834, with interest, at the rate of six per cent. per annum, on the whole of the unpaid purchase money from the day of ratification till the same is fully paid, that is to say, on the sum of 6750*l.*, currency. We would wish the completion and extension of the arrangement to take place at as early a date as may be agreeable to you, and remain, yours &c.,

(Signed),

FERGUSON, DUFFY & Co.

On this letter was written—

26th May, 1834.

MESSRS. FERGUSON, DUFFY & Co.,

Dear Sirs,—I have carefully read the contents of this letter or memorandum, and fully concur and approve of the same, as embracing our agreement.

(Signed),

JOHN HALL.

Difficulties arising, bonds of submission were entered into between the parties, referring all matters in difference between them, and all demands, &c., in law or equity, to the award of Robert Reid and Joseph Hunter, and in case of their disagreement to the umpirage of such third person as the arbitrators might choose. The arbitrators not making their award within the period, appointed Ephraim Sandford, Esq., umpire; and on the 11th of April, within

the period limited, he made up and delivered to the parties his award, in these words, endorsed on the back of the bond of submission: "I do hereby award and decree that Messrs. F. Ferguson and Edward Duffy pay to John Hall, Esq., the sum of 768*l.* 1*s.* 9*d.* (Signed), Ephraim Sanford, umpire, appointed by the arbitrators, Peterborough, 11th April, 1835." At the same time that the arbitrator delivered the above award to Ferguson and Duffy, he delivered to them also another writing signed by himself, and bearing the same date, containing as follows:

TO MESSRS. FERGUSON AND DUFFY, AND JOHN HALL, ESQ.,

Gentlemen,—In entering upon the important duty assigned to me by the appointment of Robert Reid, Esq., and Mr. Joseph Hunter, as umpire to settle the matter in dispute between yourselves, I do so with the impression that liberal minds, whatever may be the decision, will bear me out in the conviction that I have acted with conscious rectitude. The subject for my consideration is, to whom the breach of contract is chargeable, this being the main foundation upon which rests the after decision. The non-fulfilment of the first payment, or rather the not having made a legal tender of the same, would seem to say that Messrs. Ferguson and Duffy were at fault in this point; but, could a shadow of doubt remain as respects this, the opinion of D. Bethune, Esq., in his written communication sent up by him, with the papers transmitted by Geo. S. Boulton, Esq., for signature, has a direct tendency to remove any doubt upon this point. I deem it quite unnecessary to repeat Mr. Bethune's opinion as stated by Mr. Duffy. I therefore, upon this ground, charge Messrs. Ferguson and Duffy with the loss by the depreciation of the property in consequence of taking it back, 1128*l.* 2*s.* 6*d.* I next proceed to the item of rent. This would appear to be a fair charge at 15 per cent. for eight months upon the value of the property as sold, say 8500*l.*, producing at this rate the sum of 850*l.* The next item is the saw logs, in which there appears a deficiency of 1350; and, although there has been an offer on the part of Mr. Duffy to supply that deficiency upon certain conditions, yet as such agreement has not been completed by the parties, I cannot take the same into consideration, and have therefore stated this item in the account.

The paper then contains some explanations respecting smaller items of charge upon which the umpire had adjudged, setting forth the reasons of his decision, but these charges are unconnected with the contract for the sale of the mill, &c., and then the umpire adds—

The loss stated to have been sustained by Mr. John Hall in transferring his funds, in consequence of the sale of property in

Peterborough, and investing them in Harvey, I decline taking at all into consideration ; and although I consider this investment a direct consequence resulting from the sale, yet I must only view it in the light of a misfortune.

The account referred to by the umpire is as follows :

Drs. MESSRS. FERGUSON and DUFFY in account with JOHN HALL.

April 11, 1835.

For deduction of value of concern from breach of contract on your part	£1128	2	6
For eight months rent of the concern from 1st July, 1834, to 1st March, 1835, calculated at 15 per cent. per annum, on 8500 <i>l.</i>	850	0	0
For deficiency of 1350 saw logs, at 3½ logs p. m., would produce 385 <i>g.</i> , at 15 <i>s.</i> per thousand, net profit is	289	5	9
For the short supply of whisky grain for 66 days at 10 bushels per day, 3½ gallons per bushel, 2310 gallons at 7 <i>d.</i> per gallon, net profit.....	67	7	6
For damage to mill race, to wit, costs of repairs.....	22	10	0
Grist and Saw Mill idle for ten days	27	10	0
For loss by fire at Tavern	82	0	0
	£2466	15	9

To balance brought down, due John Hall this day £768 1 9

Cr.

April 11, 1835.

By amount of payment from Mr. Duffy	£750	0	0
By interest from 1st July, 1834, to 1st March, 1835	30	0	0
By cash 1st July, 1834	500	0	0
Eight months interest on the same	20	0	0
By improvements at the dam	50	0	0
By general improvements to the concern exclusive of the dam ...	100	0	0
By amount of running account as settled.....	248	14	0
By balance carried to debet side.....	768	1	9
	£2466	15	9

At the foot of this account is written—

This balance of 768*l.* 1*s.* 9*d.*, is due this day from Ferguson and Duffy to Mr. John Hall, payable in cash or a good and sufficient bankable note, with interest included for 90 days, unless the parties close the contract for the deficiency in saw logs, in which event that amount will be deducted when delivered.

Sullivan moved in Trinity term last, on the part of Ferguson and Duffy, to set aside this award on the grounds, that the umpire mistook the law respecting the title of Hall to the property sold by him—that the umpirage was founded on a mistake with respect to the opinion given by D. Bethune, Esq., and mentioned in the umpirage—and further, that the umpirage is founded on a mistake in point of law, and is not final.

In support of the objection, that the award is founded upon a mistake in point of law, it was contended that the

writing delivered with the award must be looked upon as part of the award, and that it discloses the grounds upon which the umpire proceeded—that he there avows that he had charged Ferguson and Duffy with the two large sums of 1128*l.* 2*s.* 6*d.*, and 850*l.*, upon the principle that the breach of contract was chargeable upon them.

The *Solicitor General* and *Bidwell* shewed cause.

The court took time to consider, and this day judgment was given.

ROBINSON, C. J.—I must say that I find difficulty in deciding from the mere inspection of the documents, at what time Mr. Hall was bound to make a title to the property. When Messrs. Ferguson and Duffy thus express themselves—"We consider that you have sold and that we have purchased the whole of that part of your freehold property called, &c., with a good clear and indisputable title to the same," they clearly mean nothing more than that they had bargained for such title. Then, when they stipulate for the payment of the purchase money, they say 1750*l.* is to be paid, and receipts exchanged on possession being given. Nothing that is here said, in my opinion, entitles us to decide that besides giving possession, Mr. Hall was even at this time bound to make a title. I consider it, on the contrary, the more reasonable inference, from the nature of the agreement, that he was not expected to do so. The umpire very properly felt that the main consideration in the case was, to whom the breach of contract was chargeable. He avows that he was aware of the necessity of determining this point. He heard the parties and their evidence—all differences and demands in law or in equity were referred to him—and on a view of the whole, he considered Ferguson and Duffy the persons chargeable, (i. e., not merely chargeable technically, and according to a strict legal construction which a court might adopt, but substantially chargeable, that is, as I think it reasonable to interpret what he has said, he found that it was to be imputed to them that the sale did not ultimately take effect). We desired to ascertain whether the umpire, in considering Messrs. Hall and Duffy chargeable with the breach of the contract,

founded his opinion upon what he took to be the strict legal effect of their agreement, in which respect he might perhaps have fallen into an error, and to ascertain this, we desired that he might offer us some explanation of his award upon that point. His answer in the affidavit filed last term is, that he made his award according to what he conceived to be equity and good conscience between the parties, and did not mean to take upon himself to decide according to strict rules of law; that he did not pretend to determine when the breach of agreement made between the parties accrued, or when Mr. Hall was bound by the agreement to give a title, but that he decided upon the merits generally. The submission gave him a right to decide the controversy in this manner. We cannot say that upon the merits he came to a wrong conclusion, since he may have seen clearly upon the evidence and the statements of the parties that, independently of any questions of technical nicety in regard to the time or nature of the title, it was not the intention of Messrs. Ferguson and Duffy to abide by the purchase, and to act up to the spirit of their agreement, and that its final and complete failure was to be attributed to them.

The sum awarded by the umpire seems to be large—perhaps it is extravagant under the circumstances—but I am not certain that it is excessive, because I can conceive that the facts might be such as to justify it. Upon all that we have seen and heard, I am inclined to think a more moderate award would have been more just, but it is not for us to overrule the judgment of an arbitrator upon that point. In two cases recently before us, *Mason v. Sheldon et al.*, and *Ducat v. Greene*, our inclination would have led us to relieve against the award on the ground of the damages being too high; but the authorities against such an interference are too strong to be got over, unless other circumstances concur, or unless the damages are so clearly outrageous as to afford a strong inference of partiality. The rule we think must be discharged. The cases in courts of Equity against such an interference as is desired in this case, are as strongly against it as those in courts of Law, though in both it is not denied that there may be cases so

peculiar as to warrant it. And the general tenor of the authorities shew that we should be exercising our discretion in a very unusual manner, if we were to set aside this award.—13 Ea. 357; Kyd on Awards, 351; 2 B. & A. 691; 6 Taunt. 254; 3 B. & A. 237; 1 Taunt. 48; 1 Vernon, 157; 3 Atk. 494, 644; 1 D. & R. 366; 2 Eq. Ca. Abr. 80, p. 18; Salk. 71; 2 Burr. 701; 1 Swanst. 59.

SHERWOOD, J., concurred.

MACAULAY, J.—Although there is some conflict in the authorities, the better opinion seems to be, that unless for the purposes of impeaching an award upon the ground of misconduct, irregularity or other collateral ground, apart from the merits of the controversy, the court cannot receive affidavits to explain the facts and principles by which the arbitrator was governed, in order to adjudge upon the validity of the award in law, under the circumstances. The rule seems to be, that unless the facts &c., appear on the face of the award, or in some document therein referred to, the court cannot investigate them, in order to impeach the arbitrator's judgment thereon.—1 Sal. 71, 3 (n); 2 Bur. 701. Formerly the court could exercise no summary control over submissions unless by rule of court; in all other cases, persons could only obtain relief in equity upon collateral grounds, or resist an action by pleading or impugning the validity of the award itself, for defects apparent in law upon the face of it. And it will be found that when the award is good upon the face of it, few matters are pleadable to shew it void in law. The corruption or misconduct of the arbitrators cannot, it is said, be pleaded in bar. The 9 and 10 Wm. III. ch. 15, authorized parties to agree on any written submission to arbitrators, that such submission should be made a rule of any of his Majesty's courts of record which the parties should choose, and declared that any arbitration or umpirage procured by *corruption* or *undue means* should be adjudged void and of none effect, and should be set aside by any court of law or equity, &c.—It has been held that nothing is a ground for setting aside an award under the statute, but manifest corruption in the arbitrators, and that for any other illegality

or defect, the court would refuse to enforce it by attachment, (1 Str. 301 ; And. 297; Watson, 155)—but it is said to be the practice of the courts at the present day to entertain other objections. Indeed, under the words “*undue means*,” which are added and disjoined from “corruption,” as importing something else—culpable irregularities would seem to be included. In one case (2 Bur. 701), Lord Mansfield said, the court would not enter into the merits of the matter, but only take into consideration such legal objections as appeared upon the face of the award, and such objections as go to the misbehaviour of the arbitrators, to which is justly added a query, as to misbehaviour in the party also.—1 & B. B. 357, 363 ; 3 Moor. 688, 692. It is also said, that an award is a decree made by judges, deriving authority from the choice of the parties—that debt lies on the award, because the subject matter of reference by the award *transit in rem judicatam*, and it is so far viewed in this light, that like a judgment, the courts will not examine the decision except upon the facts, &c., apparent upon inspection—collateral investigation being only admissible to shew corruption, or some undue proceeding or irregularity sufficient to set aside the award, without regard to the merits or sufficiency of the award itself.

It is also manifest that arbitrators are allowed a greater latitude than courts of justice—they may entertain equitable considerations, and are not bound to abide by the law of the case, so that although upon the face of it, an award appears to have departed from, or not to have conformed to the law, it will not be set aside, unless it also appear that the arbitrator meant to govern himself by the law, but mistook it, and more especially if he did not design adhering to law, but adopted what he considered equitable ; and it is settled, that when it is desired to submit the correctness of the decision in point of law to the court, the grounds of the award should be incorporated with it, and appear upon the face thereof. Some *dicta* assert that an arbitrator is bound to proceed according to law, but such a rule is not universal. The submission may at times require it, but if a mere question of law is submitted, the decision, though

erroneous, cannot be disturbed ; and when matters in dispute in law and equity are submitted, a wide discretion is necessarily imparted to the referee. Taking the general rule to be, that a court will not set aside an award on the ground of a mistake in law, unless the principles of law upon which the arbitrator decided appear on the face of the award, the question arises, under what circumstances and how far can the court look into documents explanatory of (though not strictly a part of) the award, for the purpose of testing its validity. The case of *Kent v. Elstob* (3 Ea. 18), would shew that the paper delivered with the award, may, in this case, be adopted as a part or as explanatory of the principle of the decision, and be examined. The spirit of other cases and principles of rational justice would seem to warrant an inspection of the agreement between the parties, touching the subject matter of the controversy, as being referred to in the paper, stating the basis and principles of the umpirage, and as indispensable to a correct understanding of those principles, (13 Eart. 358 ; 1 Ves. jr. 369 ; 9 Moor. 667) ; beyond this, (unless for the extraneous purpose of impugning the conduct of the umpire, which is not questioned in the motion before us), I fear the court is not at liberty to explore. If they could, justice to both parties would impose upon them the necessity of hearing full statements, on affidavits, of all offered on either side. This exception may, however, be noticed—that if the arbitrator is himself convinced of having committed a mistake, or is disposed to disclose more fully than in his award, the grounds and principles of his decision, his explanations on oath may be accepted, subject to the discretion of the court how far they should be entertained, or be allowed to operate in favour of, or against an application to set aside his award. As no misconduct is imputed to the umpire in the present motion, nor any undue means or irregularity urged as a ground of relief, no question is raised upon any such collateral points, and the case must be decided with a view to other exceptions impeaching the validity of the award itself, although no corruption or irregularity be imputable to the umpire or the opposite

party. The first ground submitted is, that the umpire has mistaken the law respecting the title of Hall to the property sold by him to Ferguson and Duffy. This objection is met by a double reply; first, by a reference to the submission, which clothed the umpire with an equitable as well as a legal discretion, so that he was not bound to adhere to a strict legal interpretation of the parties' contract. Secondly, by showing that in point of fact the umpire did not profess to be governed by rules of law, but a sense of what he felt to be just and right, and by the argument that the award, even in connexion with the agreement, does not shew that any such mistake was committed. For all that appears, it may have been the opinion of the arbitrator that Hall had such a title as he undertook to sell, or that his vendee entered into the contract with full knowledge of the state of it, or that, in addition to such knowledge, they agreed to accept the bargain offered, and to postpone a right to conveyances until the purchase money was all paid, when, and not before, the vendor was expected to be prepared with a perfect title. The umpire may have heard evidence explanatory of the letter containing the contract which a court of law could not allow to explain or superadd the writing, but which he may not have been precluded from receiving, and which may have been material to a full and just understanding of the true and equitable merit of the transaction. This objection fails therefore, because it does not appear that the umpire meant to abide by the strict legal interpretation of the contract *per se*, or to pronounce upon the legal character of Hall's title; or if he did, the facts disclosed do not enable the court to say whether, under all the circumstances before him, he was not correct in his views of the title of Hall, as far as respected the sale he had negotiated.

The second point is, that the umpirage was founded on a mistake with respect to the opinion of Mr. Bethune. This is answered by proof that he was not governed thereby.

Third—that it is founded on a mistake in point of law. To this it is answered, that the umpire did not profess or design to proceed upon strict legal grounds only, but upon what he considered the justice and equity of the case,

without regard to technical or strict legal rules of construction. I must infer however, that he meant to abide by the law in determining who was guilty of the first breach of the agreement, because he declares on his explanatory memorandum, that "the subject for his consideration was to whom the breach of the contract was chargeable," &c. Now this necessarily forms a legal and not an equitable consideration; and as the contrary does not appear on the face of the award, it must be presumed that he meant to express his judgment in law touching the question suggested. He proceeds to say that the non-payment, or omission to tender the first payment, seemed to fix the defendants with the first default, whereupon he charges them 1128*l.* 2*s.* 6*d.*, for the loss by the depreciation of the property in consequence of taking it back, also 850*l.* for eight months' rent, being 15 per cent per annum upon the purchase money. It is fairly presented to the Court therefore, whether the defendants were or were not guilty of the first default. In the absence of anything to shew a want of title in Hall on the face of the award or agreement, or without resort to affidavits suggesting facts *dehors* the award, I fear the Court are not at liberty to assume as a fact to be noticed in this case that Hall's title was defective, or that defendants had not with the possession received a conveyance; and as already noticed, it might have satisfactorily appeared to the umpire that such was the fact, or that the defendants waved all objections to the title, not expecting a conveyance till they had paid up the full purchase money. In this light it would follow, that the first breach was on the defendants' part. But, if it were raised as a question for the Court now to decide whether upon the face of the letter of the 26th May, 1834, the defendants were entitled to a good title with conveyances presently, or not entitled to demand the same till the whole purchase was paid up, I should incline to the opinion that they had a right to expect and to exact a good, clear and indisputable title to be conveyed to them forthwith. The payments were to be made by periodical instalments, and the terms of the contract do not import that those payments were conditions

precedent to a conveyance, but rather, that a conveyance was precedent and not to depend upon performance of the other part. It is consistent with the agreement that the defendant should have had a conveyance before possession, and when a large payment was promised upon receiving possession, the conveyance of a good title may reasonably be regarded as a concurrent act which they had a right to expect and require. It may however have been otherwise understood, and have been so established to the satisfaction of the umpire. And, without regard to the title of Hall, it is within the literal terms of the agreement, that 1750*l.* were to be paid upon receiving possession; and, as the defendants received and accepted possession, (with perhaps full knowledge of all the circumstances,) it might be held to follow, that they waived any concurrent or precedent act incumbent upon Hall, and obviously the event had occurred upon which the 1750*l.* were to be advanced. If therefore the umpire is not quite correct in his construction of law, that the first breach of contract was on the defendants' part, it is at least a doubtful question, in which event the Courts do not interfere to disturb awards.—3 Atk. 494; 3 B & C. 237.

An ulterior question has presented more difficulty to me, and indeed is the ground on which I have mainly hesitated. It is the consequences which the umpire considered to flow from such breach of contract—namely, the liability to make good the depreciation of the estate in point of value, and without regard to actual profit, to pay a large rent for the use and occupation, as if it had undergone no such depreciation. He first charges the defendant 1128*l.* 2*s.* 6*d.* for depreciation of the estate in value in the course of eight months—not from waste on their part, but apparently from the decline of the property in market value, owing to the contingencies of the times, over which the defendant had no control, in addition to which he exacts a rent, reckoned upon the principle of 15 per cent. upon the whole purchase money of 8500*l.*, although the property must have been gradually sinking below that value, and although of that sum the plaintiff Hall had received 1250*l.*, upon no part of

which are the defendants allowed a credit exceeding six per cent. and although it does not appear as a ground for fixing so liberal a rent, that in point of fact the beneficial enjoyments of the premises realized any such sum to the defendants, or could have been of equivalent advantage to the plaintiff had he possessed the same. The rent allowed seems to be settled upon an arbitrary principle of computation, adopted as a reasonable rule in the abstract, without regard to the real beneficial advantages derived by the occupant, which is the true rule, or the real loss of the plaintiff if that formed a sounder criterion.

Now, if after the defendants took possession and had paid 1250*l.*, they repudiated the contract, owing to the incapacity of Hall to make a good title, it follows, either that they had a legal right to do so, in which event the nominal breach on their part in non-payment of the additional 500*l.*, would not enable Hall to recover damages for the depreciation of the estate, or they had no right to relinquish the bargain, in which event Hall would not be bound to accept it back, and might enforce by an action, the payment of the instalments as they became due, while the defendants could not by any action obtain a good title, if Hall could not grant it. As observed above, it may appear however that the plaintiff was entitled to full payment before being called upon for a title, in which event, if he agreed to abandon the contract and accept back the estate, it would form a fair subject for a reference upon what terms he should do so. Looking merely at the letter and award, we cannot discover how it happened that the whole bargain was put an end to. It is perceptible how a controversy might have arisen touching the balance of the first instalment, but not in other particulars, nothing is disclosed from which a concurrent breach on the plaintiff's part can also be enforced. It is no part of the award that the plaintiff should take back the estate—it is assumed as already so understood or arranged. The facts appearing are, that Hall agreed to sell the estate to the defendants for 8500*l.*, with a good, clear and indisputable title to the same, and that defendants agreed to pay 1750*l.* on recovering possession, and the residue in three or

five years. That afterwards, defendants received possession and retained it eight months, when it was restored, and in the interim paid 1250*l.* only, of the first instalment of 1750*l.* That all disputes in law and equity were referred to the umpire, who awarded that the non-payment or tender of the first payment fixed defendants with the first default; whereupon he charged them 1128*l.* 2*s.* 6*d.* for loss in the depreciation of the property in consequence of taking it back, and 850*l.* for eight months' use and occupation, being 15 per cent. per annum upon the whole purchase money, 8500*l.* For all that appears, (without extending our view beyond the face of the award and adverting to the affidavit and other *ex parte* documents laid before the Court,) the only visible breach of contract was chargeable to the defendants, and if there was no defalcation on the plaintiff's part, the reason or necessity for taking back an estate so suddenly and so greatly depreciated, unless at his election so to do, is not readily perceived. It may however have been so mutually arranged between the parties, subject to the judgment of referees as to the terms upon which it should be done, and may have formed one subject of controversy or dispute submitted to the umpire in conjunction with the claim for mesne profits; and if so, can it be said the result is objectionable, except on the score of amount which however apparently unreasonable, may in truth be just? Mere unreasonableness, unless corruption or wilful misconduct or perversion of the judgment of the umpire can be inferred from it, will not invalidate his award; and no such ground has been taken, and if it had been, I could not say, the decision is so glaring and outrageously excessive as to warrant the inference of *mala fides*. I could not impeach his motives, however I might dissent from his opinion. Then, can it on the other hand, be said, that in awarding damages the umpire meant to follow the law, and if so, that he has erred therein by allowing damages that do not legally flow or result from the breach of contract found by him. If it is to be assumed that the damages are awarded exclusively in consequence of the breach of the non-payment of the first instalment in full, I do not

think the premises warrant the conclusion ; but is it apparent that such breach is the sole cause, or may not other considerations have had weight ? It is stated in the umpire's minute as a consequence—wherefore he charges the defendants 112*l.* 2*s.* 6*d.*, yet it may have been on the ground that as the contract was abandoned, the umpire thought the loss should fall upon the party primarily in default, as an equitable consequence ; and for aught that appears, the defendants were the first defaulters. It was open to the umpire to take into view the whole conduct of both parties throughout the transaction, and since it was so, it is more reasonable to suppose that the heavy damages awarded against the defendants, proved, from a consideration of the whole merits, rather than as a consequence of their default in paying 500*l.*, the balance of the first instalment, which of itself could justify no such penalties. However it may have been to a general breaking off the bargain and rescission of the entire contract, subject to a reference touching the conduct of both parties, and of the remuneration to which under all circumstances the one could exact from the other.

One further question has presented itself—namely, whether the award is defective in point of mutuality and conclusiveness, owing to the silence of the umpire respecting the restoration of the premises, or extinguishment of the contract, so that each party should be restored to their former situation as far as capable of being placed in *statu quo*—that is, the one being relieved from the purchase, and the other bound to take back the premises and abandon the sale. But it is not suggested that the umpire did not entertain and dispose of all matters submitted to him, and the question of abandoning the contract may have been mutually arranged before the reference, leaving only in dispute the terms. The award assumes that the property had been taken back by Hall, and the effect of the award is to put an end to all controversies, rights of action, &c., touching the same.

I perceive therefore no ground that warrants the Court in undoing this reference upon the present application, however,

from all as I have yet heard, I may be impressed as to the moderation of the damages or rent awarded, or as to the equity or soundness of the principles upon which apparently those damages and that rent have been computed.

Per Cur.—Rule discharged.

McKAY v. LOCKHART.

It is sufficient to discharge the owner of a vessel, conveying goods from port to port, from liability arising from the non-delivery of part of those goods, to shew that they were delivered by the master of the vessel at the port to which they were consigned, and notice given, during the usual business hours, to the consignee.

This was an action by the plaintiff as owner and consignee, against the defendant, as owner of the schooner *Jesse Wood*, for not delivering a puncheon of wine, shipped on board said vessel at Brockville, to be carried to Toronto. Plea.—The general issue. It appeared in evidence on the plaintiff's part, that Joseph Agar, the master of the *Jesse Wood*, received on board at Brockville, for the plaintiff, on the 23d November 1834, 37 pieces of goods, numbered from some number below 760 onwards, including a puncheon of wine, No. 760. That the plaintiff had notice of their arrival at Toronto, and that all the things except the wine were received. The vessel contained goods for other persons, and the carter of plaintiff, (a person who had performed all his carting for four years previous,) carted the plaintiff's goods from Feehan's wharf, where they were unladen, to the plaintiff's store. Being examined, the carter said he drew up the whole on the same day, and in the evening was paid by the plaintiff, who found fault with him for not bringing the wine, which induced him to return to the vessel to enquire for it. He stated that on his way down he met Agar, the master, going into the town with a friend, and on going on board the vessel was then told by some of the crew that the wine had not been landed. It appeared that on the same evening the plaintiff came to Feehan, the wharfinger, for the bill of lading, expressing his anxiety to get the wine, having agreed for the sale of it, but that Feehan had not received the bill of lading, and that it was found in the possession of Mr. Murray, a gentleman con-

nected with the forwarders, who had shipped the goods at Brockville; that the plaintiff went on board to inquire about the wine, and received the same answer as his carter. It was also in evidence, that on the ensuing day the carter went several times to the vessel about the wine, and was uniformly answered that it was not yet landed; and it appeared that the plaintiff had also attended during the day, anxious about the missing property; that when the vessel was wholly unladen, the Wine was still absent, of which the master had notice, and who expressed some apprehensions that it might through mistake have been re-shipped on board the Princess Victoria, also belonging to the defendant, which had been lying near the Jesse Wood taking in goods for Niagara, and who promised to make inquiry on the subject, but it did not turn out that any such mistake had occurred. On the defence, the master, (who had been released,) was examined, and said that all the goods were brought here and were landed on two separate days, he himself superintending the discharge of her cargo on the first day, noting the number of pieces landed on the wharf for the plaintiff, but not by the numbers or any other distinguishing mark on them. That 10 pieces were landed in his presence, but that on the second day he was sick, when the duty of discharging was entrusted to one of the seamen, now master of another vessel. This seaman was called, and stated that on the second day he had seen landed for the plaintiff, 10 boxes of raisins, 16 coils of rope, and a cask, No. 760—that is the day the Captain was sick, and that the vessel was two days in discharging her cargo.—That the plaintiff was down several times, and was on board on the second day, and in the hold, pointing out and urging the discharge of his goods. This witness said he was not aware of anything being missing until the vessel was discharged, but heard of it before leaving port, and told the master it had been landed. He produced a small book in which appeared a number of pencil entries, as of the number of pieces delivered out of the vessel, for different consignees, but it did not contain the original note, being made from memoranda on a loose paper, not forthcoming,

and said to be lost or destroyed. He said the entries were made in the evening after the whole had been landed. On one page of the book appeared three entries on plaintiff's account—the first and the last specifying the number of pieces unshipped for plaintiff, but not designated by their respective numbers. In the middle was a cask, No. 760, the only one distinguished by its own number. The witnesses on the defence complained of the loose and careless way in which carters were allowed, without apparent authority or check to take away goods from the wharf, and one of them said that after the vessel had been discharged, he saw two of them disputing the proprietor of a cask marked S. and K. M. on the bung which was said to mean Mr. Smith of Toronto, and not the plaintiff. The master of the vessel expressed his opinion of the usage of trade to be, that a landing at the wharf, whether the consignee was present or absent, exonerated the owner of the vessel at once, provided such consignee had notice of her arrival, or knew where she was to be discharged, and that he considered the goods as delivered to the wharfinger in the absence of the owner or his agent, or at all events, that he was discharged. Mr. Feehan, a brother of the wharfinger, denied having received any of the goods discharged from the *Jesse Wood*, although it is usual for him to receive the bills of lading and notify consignees, having an interest and claim as owner of the wharf, and that in the absence of consignees, he often takes charge of goods landed from steamboats or other crafts. He said that his brother was on his death-bed at this period, and required his constant attendance, so that he could not and did not interfere at all in the unloading of the defendant's vessel. The parties did not agree as to whether the plaintiff's goods were landed on one or two days.—The whole cargo was discharged in two days, after which the vessel sailed away. The plaintiff's carter persisted in saying he took up all except the wine in one day, was paid in the evening, and re-visited the vessel the next day. The master and mate maintained that a part only was discharged on the first, and the residue on the following day. The master admitted having received the cask; could produce

no receipt from the plaintiff for its delivery ; it did not reach plaintiff ; and notice was repeatedly given on board the vessel that it was missing, no other answer appearing to have been returned but that it had not been landed. It was at first supposed that the plaintiff's goods had been consigned to Feehan, and a delivery to him was asserted, but it was explained that such was not the fact in this instance.

It was contended by the plaintiff that the owner of the vessel was not exonerated, and by the defendant that there was positive evidence that the cask had been placed on the wharf, and if so, that the duty of the ship owner ceased the moment it was landed, the consignee having received previous notice of the arrival and place of discharge, it being incumbent on the latter at his peril to attend and take charge of the property whenever discharged, as being thenceforward at his risk.

Macaulay, J. who tried the cause, did not make it a distinct question for the jury whether in fact the cask had been landed on the wharf or not, but he told them, that, whether or not, the defendant was liable under the evidence, upon the satisfactory ground that although the plaintiff had notice of the vessel's arrival, of the place of discharge, and had received all the rest of the consignment—and although it might be a just rule and the understood usages of trade that after reasonable notice the consignee or his agents should be attending to take charge of the goods on the wharf, where doubtless they were to be delivered as fast as turned out—yet that after the diligent attention of the plaintiff on this occasion so far as he was concerned, and after the repeated notices that this cask was missing, and the inquiries in vain made after it, and the answers given to account for its non-production, he considered that the master was bound to give a special or new notice when it was forthcoming, that the plaintiff might attend and receive it : that under the circumstances, the plaintiff was not bound to remain at the gangway of the schooner expecting this absent article, but was entitled to a special notification when it was unshipped. He thought plaintiff had done all that could be reasonably expected of him, and that the onus and respon-

sibility would be on the ship-master. He did not think that a bare landing on the wharf under these circumstances, in the absence of the plaintiff and his agents, could constitute a delivery and acceptance, actually or constructively, so as to end the defendant's liabilities and place the property at the plaintiff's risk. He therefore instructed the jury to find for the plaintiff if they thought the wine had not been landed at all, or had not been landed (as the judge thought it had not) with fair notice and opportunity to the plaintiff to attend and receive it, or to secure it and protect his interest in the same. On the other hand, they were told to find for the defendant if the wine had been landed in the usual course of business. The jury found for the plaintiff.

In Michaelmas term the *Solicitor General* obtained a rule nisi for a new trial, on the ground of misdirection. *Bogert* shewed cause.

ROBINSON, C. J.—Upon the report of this case made by the learned judge who tried it, I think the evidence warranted the verdict, and that upon the whole complexion of the case, the jury came to the conclusion which was most consistent with the testimony. But I cannot go so far as to say that I think their verdict was consistent with *all* the evidence given. On the contrary, I apprehend that if they chose to give implicit credit to the witness Wheeler, their verdict might have been rendered for the defendant. The nature of the transaction brings it, I think, under the rule which governs the delivery of goods at a port in England by a ship bringing them from abroad. The same delivery which would have discharged the master and owners if the goods had been shipped at Oswego, would discharge them equally in this case. The carrying in coaches and on canals is governed in some respect, by different rules. When the master gave notice to the plaintiff of the arrival of the goods, it became the duty of the plaintiff to attend and take charge of them, and give reasonable facility to their delivery. It is not necessary to determine whether by general usage, or the particular facts of the case, the master would have been discharged by simply unloading them on the wharf, or putting them in charge of the wharfinger, for

he did in fact give notice to the plaintiff and the plaintiff did in consequence attend.

Waiving the formality of checking the packages one by one, in order to ascertain whether all were landed before any should be removed, he acted as if he took it for granted all was right, and sent down his carter to take them up to the town. The carter could not have gotten them otherwise than by the master unlading them on the wharf, and therefore the sending the carter to bring them up and receiving what he brought, having notice of all that had been shipped, implied a permission to the master to land the whole, without further formality. If therefore he did in fact land the cask of wine, as he landed the other things, he was in my opinion discharged, whatever may have become of it. Wheeler's evidence tends to establish that the cask was so unladed the second day, not under any peculiar circumstances, but with other packages, and in the same manner. If that were the fact, then I think the wine was delivered, and the defendant discharged, and the mistake of the master in imagining it had not been landed, and the statements he made in consequence of such an erroneous impression would not alter the fact of delivery ; but my difficulty is, I do not think the jury ought to have been satisfied by Wheeler's evidence, inconsistent as it was with that of the plaintiff's brother, the carter's, and Feehan's, and not free I think from suspicion, from the terms in which it was given. My impression from the whole testimony is, that the wine was not landed under the same circumstances that the other packages were, and I think that it is most likely the jury were of the same opinion. To award a new trial when the verdict was supported by the weight of testimony, merely because we differ in one respect from the view of the law taken at the trial, seems to me contrary to principles on which new trials are granted. One of my learned brothers however, who concurs with me in thinking that the evidence of Wheeler would have supported a verdict for the defendant, is further of the opinion, I believe, that on this account it would be proper to grant a new trial, since we cannot certainly infer that the jury may not have been

satisfied of the truth of Wheeler's evidence, and may nevertheless have been led by the learned judge's view of the law, as explained to them, to find for the plaintiff.

Under such circumstances, I feel that it would not be satisfactory to let the verdict stand, and therefore concur in ordering a new trial without costs.

SHERWOOD, J. (after stating the case)—As the verdict of the jury seems to have been given on the ground of the failure of the defendant to place the cask of wine on the same wharf where the plaintiff received his other goods, I will assume the affirmative proposition, that the defendant did land the cask on the same wharf the next day after the plaintiff's request, in order that I may consider the point of law, which appears rather important, as similar cases are often likely to occur at this and other ports on the lakes. The facts of this case shew the defendant is a common carrier by water from port to port, and is subject, in my opinion, to the like liabilities as common carriers are along the English coast who have not modified the rules of the common law as respects themselves by any special contract, or by giving public notice restrictive of their common law liability. A majority of the English decisions on this subject will be found to originate in questions respecting the duties of carriers of goods by land or in boats on canals and harbors and rivers. The liabilities of such carriers are generally regulated by the course and usage of particular trades, or by the custom of particular places; but the duties of carriers engaged in the coasting trade of England are, generally speaking, the same which the common law prescribes. It is an axiom that every common carrier is an insurer of the goods entrusted to his care, and therefore the defendant was responsible for the cask of wine while it was in his possession as carrier. Presuming the cask was landed on the wharf with other articles belonging to the plaintiff, it remains to be examined whether the defendant by this act parts with the possession so as to remove his liability as insurer.

In the case of *Golden v. Manning et al.*, 3 Wil. 429, the court said that carriers were obliged to send notice to persons to

whom goods were directed of the arrival of the goods, within a reasonable time ; and in the case in 3 T. R. 397, Buller, J., said, "A ship trading from one port to another has not the means of carrying the goods on land ; and, according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the carrier." The same judge also held in the same case, that a carrier of goods from a foreign country to England is considered as a carrier from port to port in England as regards the delivery of the goods. In the present case, the plaintiff contends that as he demanded the cask of wine himself, and sent his servant for it after notice of the arrival of his goods, and as it was not delivered upon demand ; it then became the duty of the defendant to give him special notice of the landing of the cask afterwards, and unless he did so, his responsibility as insurer would still continue, although the cask was in fact landed on the wharf for the plaintiff in the same manner as the other goods were which the plaintiff took away.

I take it for granted that the cask was landed at a seasonable hour of the day, because there is nothing in the evidence to shew that it was landed in the night or at any other unreasonable time out of the usual course of business ; for if it were, the case would admit of a different construction. According to the facts, however, I am of opinion, upon the authority of the cases already cited and upon general principles, that the defendant's liability as carrier ceased after he had given notice to the consignee of the arrival of the goods, and had placed the cask of wine on the wharf where the plaintiff received his other goods. As a carrier from port to port has it not in his power to take care of the goods after they are placed on land, I think it but reasonable and just to hold him discharged from his liability after giving due notice to the consignee of the arrival of the goods and of the place of landing, and after landing them at a proper and ordinary time of daily business at the place so notified to the consignee, and in the manner usually followed by masters of vessels engaged in such trade.

MACAULAY, J.—I cannot bring myself to doubt the sound-

ness of the view I took of this case at *Nisi Prius*. It still appears to me, that after the notice given of the absence of the hogshead of wine, it was incumbent on the master of the vessel to take care of it until the plaintiff had intimation that it was forthcoming. I do not at all think that under the circumstances a bare landing on the wharf, in the absence of and without notice to the plaintiff, and without the presence of or notice to any agent on his behalf, can be regarded as a sufficient delivery within the spirit of the bill of lading as a contract, or of any usage of trade that may be supposed to prevail, so as to exonerate the shipmaster and owner from all further responsibility. The plaintiff should at least have had fair notice, with reasonable time and opportunity to see to the property and protect his interests before the duty or liability of the defendant could be considered as at an end.—1 *Ld. Ray.* 46; 2 *Esp.* 41; 2 *Esp.* 694; 4 *T. R.* 260; 2 *Bl.* 916; 1 *McL. & Y.* 120; 4 *T. R.* 581; 5 *T. R.* 389; 8 *Taunt.* 144; 4 *Price*, 31; 5 *B. & A.* 53; 3 *B. & B.* 177; 4 *B. & P.* 20; *Abbott on Shipping*, pt. 3, c. 3, s. 11.

Per Cur.—Rule absolute without costs.

REX V. KIDD.

A defendant in attachment for contempt for not paying over money pursuant to a rule of court, may be admitted to the limits, after being ordered to be committed upon his answers to interrogatories put to him.

The defendant was deputy to the late sheriff of the district of Niagara, and upon several writs of attachment which were placed in his hands, had attached merchandize and other property of considerable value belonging to one Bussell, an absconding debtor. After the appointment of the present sheriff of Niagara, an order was made on this defendant (at the instance of Storm and Whitney, creditors of Bussell), to pay over to the sheriff all monies in his hands which he had received on account of the estate of the absconding debtor. Large sums were shewn to have come to his hands from the sale of the property attached. The defendant not complying with this order, an attachment was ordered against him, and on his being brought

up in custody, interrogatories were administered to him, and upon his answers the Master reported him in contempt. The Court in this term ordered that the defendant, who had been bailed on the attachment, should stand committed to the gaol of the Home District until he paid into court the sum of 925*l.* 15*s.* 2½*d.*, which upon his own admissions he had received and not paid over; and it was further ordered, that when he paid that sum he might apply to be discharged upon rendering satisfactory explanations in regard to smaller items of charge which were specified, and upon which the answers he had given were not such as to acquit him. These were exclusive of the sum above mentioned.

The Court being asked whether he could be admitted to the limits while in custody on the attachment, said that they would consider it, and that he might apply in vacation, and the judge would intimate whether the sheriff could properly allow him the benefit of the limits.

He did afterwards apply, and was admitted to the limits, no objection being urged, and the judges conceiving that he came within the reason of the case *Rex v. Stokes*, 1 Cowp. 136.

A DIGEST

OF

ALL THE REPORTED CASES

DECIDED IN THE

KING'S BENCH & PRACTICE COURTS,

FROM MICHAELMAS TERM, 5 WILLIAM IV., TO HILARY TERM,
6 WILLIAM IV., INCLUSIVE.

VOL. IV. (OLD SERIES).

ABATEMENT.

See "Dower," 1.

ABSCONDING DEBTOR.

1. *Mesne Process. Issue of, under Absconding Debtor's Act.*] Mesne Process cannot issue under the Absconding Debtor's Act until three months have elapsed from the first advertisement under the attachment.—Banker v. Griffin, 112.

2. *Delay in moving to set aside attachment, &c., under the act. Affidavits.*] Where a defendant moved to set aside an attachment and subsequent proceedings under the Absconding Debtor's Act, several months after the last proceeding was had, on the ground that the plaintiffs were not inhabitants of the province, but filed no affidavit shewing that he was not indebted to any inhabitant of the province, the Court refused the rule and left him to his action.—Fisher et al. v. Beach, 118.

3. *Amount of bonds given by.*] The bonds required to be given by

an absconding debtor to obtain a supersedeas to the attachments against him must be double the amount of the debt sworn to.—Heather et al. v. Wallace, 131.

AFFIDAVIT.

See "Practice," 4, 6.

1. *In issuing a ca. sa. Christian names.*] It is not necessary, in affidavit made for the purpose of issuing a *capias ad satisfaciendum* by a plaintiff who has two christian names, to state the second, where his identity sufficiently appears by the affidavit describing him as the above plaintiff.—Perkins v. Connolly, 2.

AGREEMENT.

See "Bills of Exchange & Promissory Notes," 3; "Trove," 1.

AMENDMENT.

See "Variance," 1.

1. *Amendment. When allowed.*] An amendment in pleadings will be allowed after the assessment of contingent damages on

a demurrer subsequently decided against the plaintiff, where the justice of the case requires it, and the plaintiff would be finally concluded.—*Breakenridge v. King*, 297.

2. *Note. Variance between declaration and note produced.*] Where, on an assessment of damages on a promissory note stated in the declaration to be for 40*l.*, a note for 42*l.* was produced in evidence, an amendment of the record to correspond with the proof was refused, but the Court allowed a verdict to be entered for the amount of the note set out in the pleadings, on the other note being filed as the one on which the action was brought.—*Bank of Upper Canada v. Crawford*, 301.

ARBITRATION.

1. *Setting aside award.* The Court will not set aside an award, upon affidavits setting forth a party's just claim to the allowance of large sums of money upon grounds which the arbitrators had rejected.—*McMillen et al. v. McLean*, 5.

2. *Award set aside.*] An award was set aside on account of unfair conduct in the arbitrators in their manner of hearing the evidence.—*Hamilton v. Wilson*, 16.

3. *Power of arbitrators. Award set aside.*] Where a verdict was taken for 200*l.*, subject to be reduced by arbitrators, the costs to abide the event, and the award was for the defendant, it was set aside as being beyond the submission, the arbitrators being empowered only to reduce the plaintiff's verdict, and the condition as to costs giving them no authority by inference to deprive the plaintiff of it altogether, but applying only to the amount of

costs to be eventually taxed.—*Shaw v. Turton*, 100.

4. *Awards.*] Where certain matters in difference between A. and B. were referred to arbitration, and also "all costs of suit commenced or prosecuted by either party, whether civil or criminal," and the arbitrators awarded that B. should pay a large sum to A., and also all costs of suits; *Held*, that the award was sufficiently final without stating that the suits should cease, and that it could not be impeached because damages had been estimated by the arbitrators on some matters into which they should not have enquired.—*Ducat v. Green*, 110.

5. *Misconduct of arbitrators. Award set aside. Costs.*] Where, on a reference between A. & B., A.'s agent attended on his behalf, and after B. had given evidence to the amount of 200*l.*, retired, understanding from the arbitrators that the case was closed, and B., in his absence, induced two of the arbitrators to award him 1000*l.*, the third refusing to consent, the award was set aside on payment of costs.—*Van Egmont et al. v. Jones*, 119.

6. *Bond of submission to be made rule of court. Delay in objecting to award.*] If a bond of submission contain a clause that the submission shall be made a rule of court, it is not necessary that an agreement enlarging the time should be made a rule of court as well as the submission, and it is too late to object to an award after a lapse of four terms from the publication, and an attachment granted for non-performance.—*Crooks v. Chisholm and Cameron*, 121.

7. *Parol submission. Assumpsit.*] Submission by bond, with a

day limited for making the award,—on the last day, in fact, the arbitrators were ready to award, but at defendant's request put it off, to enable him to produce further evidence; all parties, however, supposed that the time fixed by the submission would not expire till the next day. The next day the arbitrators heard both parties on oath, and made an award about an hour after midnight.—*Held*, that assumpsit on a parol submission was maintainable to recover the sum awarded, and that the extension of time operated as a parol submission.—*Hull v. Alway*, 375.

8. *What court will look into.*] Where an award is legal on the face of it, and consistent with the submission, the Court will not look *dehors* the award itself, or matters incorporated in and with it, to sustain an objection that the arbitrator has mistaken the law, particularly if all matters both of law and equity are submitted, although the Court may doubt as to the soundness of the principles on which the award may seem to rest. The Court will look into papers delivered simultaneously with the award itself.—*Hall v. Ferguson and Duffy*, 392.

ARREST.

1. *Endorsement of writ of ca. re.*] When plaintiff had omitted to endorse the writ on which the defendant was arrested before delivering it to be executed, but did so before bail had been given, and within an hour or two after the arrest, the Court held the rule of Trinity Term, 3 & 4 Wm. IV., sufficiently complied with.—*Smith v. Smith*, 10.

2. *Delay.*] It was considered as ground for setting aside an

arrest on a *capias ad satisfaciendum*, that several terms had elapsed after the return of the executions against goods before the *capias ad satisfaciendum* issued.—*Glynn v. Dunlop*, 111.

3. *Privilege from.*] A suitor attending a court of requests, is privileged from arrest.—*Baldwin et al. v. Slicer*, 131.

4. *Bailable ca. re. issued. Cognovit subsequently taken. Execution on ca. sa. for more than was stated in ca. re. Arrest set aside, with costs.*] Where plaintiff sued out a bailable *ca. re.* against defendant, and before its return took a cognovit from defendant without using *ca. re.* at all, and subsequently entered judgment, entering common bail for defendant, and without any affidavit of debt other than that on which the *ca. re.* issued, which was for 1500*l.* charged him in execution on a *ca. sa.* for 2500*l.*; the Court set aside the arrest and *ca. sa.*, with costs.—*Brown v. Bethune*, 331.

ARREST OF JUDGMENT.

1. *Covenant. Premises not particularly set forth.*] In an action of breach of covenant to make a lease of premises, it is no ground for arresting the judgment that the premises are not particularly set forth, if the breach be as definitive as the terms of the covenant require.—*Rowland v. Tyler*, 257.

ASSUMPSIT.

See "Goods sold," 1.

ATTACHMENT.

Right of party attached for contempt, in not paying over monies, to limits.] A defendant, in attachment for contempt for not paying over monies pursuant to a

rule of court, may be admitted to the limits, after being ordered to be committed upon his answers to interrogatories put to him.—*Rex v. Kidd*, 415.

ATTORNEY.

See "Trespass," 2.

1. *Fees. Proof of delivery of bill.*] In an action by an attorney for his fees, he must prove the delivery of his bill, although the defendant has suffered judgment by default.—*Ridout*, one, &c. v. *Brown*, 74.

2. *Practice. Right to proceed after settlement agreed upon between the parties.*] Where, after process served, the parties came to a settlement, and the plaintiff agreed to pay his own costs, but notwithstanding the attorney went on, thinking that the defendant should pay the costs, the proceedings were set aside for irregularity.—*Parent v. McMahon*, 120.

3. *Time to plead. Delay in moving to set aside interlocutory judgment.*] In an action against an attorney, he should have full four days in term to plead, but he is too late to set aside an interlocutory judgment signed before the four days had expired two months after such judgment and after notice of assessment served; and an objection that there is not any date to a notice to plead, nor any statement that the plaintiff appears by attorney, will not be entertained.—*Monroe v. King*, one, &c.; *White et al. v. King*, one, &c., 189.

4. *Time of service of bill of costs. Evidence.*] Where an attorney served his bill of costs on the 20th May, and the placita on the *Nisi Prius* record were entitled of Trinity Term, which com-

menced on 16th June, not a lunar month after such service, but a memorandum was added—to wit, 11th July, and the plaintiff proved that his declaration was filed that day, but did not produce the writ: *Held* sufficient to entitle him to a verdict, and that if the writ issued too soon the defendant should shew it.—*McMartin*, one, &c. v. *Spafford*, 332.

AWARD.

See "Arbitration,"

BAIL.

See "Criminal Law."

BILLIARD TABLES.

See "Corporation."

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See "Joint Stock Company," 1; "Partnership," 2; "Foreign Corporation," 1.

1. *Alteration of note without the consent of one of the makers. Its effect as to recovery on note.*] Where a note, originally joint, was altered to joint and several without the consent of one of the makers, who was afterwards sued alone upon the note by an endorser: *Held*, that the plaintiff could not recover on the note on account of the alteration, nor on the money counts, as there was no privity between the maker and him.—*Sampson v. Yager*, 3.

2. *Insufficient consideration no ground of defence.*] It is no defence to an action on a promissory note, that it was given on a consideration that did not prove so beneficial as it was represented.—*Dutton v. Lake*, 15.

3. *Notice of non-payment.*] Notice of non-payment to endorser, held insufficient upon the conversation between the endorsee's

attorney and the endorser.—*Bank of Upper Canada v. Cooley*, 17.

4. *Right to sue on note given on certain conditions held to be unfulfilled.*] Where the defendant purchased personal property from the plaintiff, and gave him back a mortgage on it to secure the purchase money, and agreed if default were made in the payment, he would give up the property, and the plaintiff should sell it to pay himself and give the overplus, if any, to the defendant; and at the same time the defendant gave the plaintiff his promissory notes for the purchase money, which were not to be acted on if the property were given up; on default having been made, the property was given up and sold by the plaintiff for less than the mortgage money, and an action was then brought on one of the promissory notes to recover the difference: *Held*, that it would not lie, the notes having been satisfied by the surrender of the property according to the agreement.—*Smith v. Judson*, 134.

4. *Consideration.*] Part failure of consideration is no defence to an action on a promissory note.—*Dixon v. Paul and others*, 327.

BUBBLE ACTS.

1. *Banks chartered by Provincial Parliament not within.*] The Bubble Acts, 6 Geo. I. ch. 18, and 14 Geo. II., are not in force in this province; and banks chartered by acts of the Provincial Parliament could not come within the provisions of those acts.—*Bank of Upper Canada v. Donald Bethune*, 165. Vide also *Bank of Montreal v. J. E. Bethune*, 193.

CAPIAS AD RESPONDENDUM.

See "Arrest," 1.

1. *Bailable ca. re. How to be endorsed.*] A bailable ca. re. sued out by an attorney in person, must be endorsed with a notice to the defendant of the sum claimed and costs.—*Washburn, one, &c. &c.*, v. *Walsh*, 322.

CARRIERS.

1. *Liability of owners of vessel mortgaged, for loss of goods shipped on vessel.*—The owners of a vessel mortgaged, and in possession of and navigated by the mortgagees, are not liable for the loss of goods shipped on such vessel; and if they were liable, although the form of action were case, yet as this liability would be founded on contract, and not custom, the acquittal of one defendant would discharge the rest.—*Wilkes v. Flint et al.*, 19.

2. *Liability of owner of vessel to consignee for conveying goods, when at an end.*] It is sufficient to discharge the owner of a vessel conveying goods from port to port from liability arising from the non delivery of part of the goods, to shew that they were delivered by the master of the vessel at the port to which they were consigned, and notice given during the usual business hours to the consignee.—*McKay v. Lockhart*, 407.

CA. SA.

See "Affidavit," 1.

See "Arrest," 2, 4.

CLERK OF COURT OF REQUESTS.

See "Mandamus," 1.

COGNOVIT.

1. *Refusal of court to allow judgment to be entered on cognovit fifteen years old.*] The Court refused to allow judgment to be entered on a cognovit more than fifteen years old, where, although it

was sworn that a large debt was due, yet it appeared that the plaintiff had accepted from the defendant an assignment of property and given a discharge of the action, although the property proved unproductive.—*Grant v. Executors of McIntosh*, 184.

COMMISSION TO EXAMINE WITNESSES.

1. *Due execution of, by commissioner without his seal.* 2 *Geo. IV. ch. 1.*] Where the execution of a commission to examine witnesses in the United States was proved by the affidavit of the commissioner named therein, and the return thereof made under his hand (without his seal),—*Held*, that under the provincial statute 2 *Geo. IV. ch. 1*, the execution was sufficiently authenticated.—*Beach v. Odell*, 8.

CONTRIBUTION.

1. *Assumpsit. Right of one of several defendants to recover their shares from the rest. Proof in such action.*] One of several defendants in assumpsit, who has paid the whole amount of the damages under an execution, is entitled to recover contribution from the other defendants; and in an action for such contribution, the regularity of the judgment in the original action cannot be questioned, and it is not necessary to shew any notice of the execution, nor demand of the money before action brought.—*Woodruff v. Glassford*, 155.

CORPORATION.

See “Foreign Corporation,” 1.

1. *Power of Corporation of City of Toronto as to Billiard Tables.*] *Semble*, that the Corporation of the City of Toronto have a right to suspend all billiard tables

within its jurisdiction.—*Rex v. Inspector of Licences of the Home District*, 9.

COSTS.

See “Judgment as in case of Nonsuit,” 1.

1. *Record not entered in time. Defendant refuses to go to trial. Costs of the day.*] Where the plaintiff, having given notice of trial, did not enter his record with the clerk of assize in time, but the defendant, notwithstanding, agreed to go to trial if he were ready, and after having detained the plaintiff’s witnesses more than a week, at last determined not to go to trial; he was refused the costs of the day.—*Doe ex dem. Crawford v. Coppledike*, 6.

2. *Full costs.*] Where there are issues in law and fact, and a *venire* as well to try the issues as assess the damages, and a verdict is rendered for the plaintiff for an amount within the jurisdiction of the District Court, a certificate of costs must be applied for at the trial; and an order cannot be made by a judge, as in cases of assessment after judgment by default, for the taxation of such costs.—*Mahoney v. Twick, executor*, 99.

3. *Arbitration. District Court. Full costs.*] Where a cause is referred to arbitration by order of *Nisi Prius*, and the arbitrators award a sum within the jurisdiction of the District Court, the court or a judge may grant an order for full costs under the ninth general rule of Easter Term, 11 *Geo. IV.*—*Elmore v. Colman*, 321.

4. *Countermand of trial. Witnesses’ fees.* Where the plaintiff’s attorney sent a notice of countermand of trial to his agent in town, but it arrived too late for service, and the defendant’s witnesses at-

tended for the trial: *Held*, that the expense of such witnesses was rightly allowed in the costs of the day.—*Spafford v. Buchanan*, 325.

COURT OF REQUESTS.

See "Arrest," 3.

COVENANT.

See "Arrest of Judgment," 1; "Damages," 1.

CRIMINAL INFORMATION.

1. *Points of Practice to be complied with before filing criminal information against Justice of Peace.*] To support a motion for leave to file a criminal information against a justice of the peace, the affidavits should not be entitled as in a suit pending; notice must be given of complainant's intention to apply. The motion should be made without unnecessary delay, and sufficiently early in term to admit of notice of it being given.—In re complaint of *Bustard v. Ira Schofield, Esquire*, 11.

CRIMINAL LAW.

1. *Bail.*] A prisoner in custody for grand larceny may be admitted to bail.—*Rex v. Jones & Skinner*, 18.

2. *Prisoner. Bail. Defect in commitment remedied.*] A prisoner charged with murder may, in some cases, be admitted to bail, and on application for bail, the court may look into the information, and if they find good ground for a charge of felony, may remedy a defect in the commitment by charging a felony it.—*Rex v. Higgins*, 83.

CROWN GRANT.

1. *Effect of exemplification under great seal.*] A grant from the crown must be by matter of

record under the great seal, and an exemplification under the great seal of a grant invalid in its inception will not have the effect of making such grant valid by relation from its commencement.—*Doe ex dem. Jackson v. Wilkes*, 142.

DAMAGES.

See "Trove," 1.

1. *In breach of good title—what measure of.*] In an action for breach of covenant for good title, no damages can be recovered for improvements or the increased value of the land, the purchase money and interest forming the measure of damages.—*McKinnon v. Burrows*, 71.

DEBTOR.

See "Demand" (from debtor on limits).

DEED.

1. *Construction of.*] Where, in a deed, a certain quantity of land, and half of a saw-mill thereon erected, were conveyed, and the description of the premises covered the whole site of the mill,—*Held*, that the express words must control the operation of the deed, and that the vendee was entitled to only half the mill.—*Doe ex dem. Miller v. Dixon*, 101.

2. *Bargain and sale. Registry, 4 Wm. IV. ch. 1, sec. 47.*] The Registry Act does not apply where there has been no previous registered deed; and since statute 4 Wm. IV., ch. 1, sec. 47, a deed of bargain and sale does not require registry nor enrolment to make it a valid conveyance.—*Doe ex dem. Adkins v. Atkinson*, 140.

3. *Setting aside of deed. Inadequacy of price. Fraud.*] A court of law has power to set

aside a deed where a jury finds that actual fraud has been practiced in obtaining it; and although mere inadequacy of price is no ground for impeaching a conveyance, yet, when taken in connection with the mental imbecility of the party executing it, it goes strongly to prove fraud.—Doe dem. Jones v. Capreol, 227.

4. *Fraudulent conveyance.*] Where A. being seized in fee of lands, sold a portion of it to B., but gave him no deed, and B. went into possession, and A. afterwards sold all the land to C., directing that a deed should be made to B. of his portion when he paid for it in full, and C. sold all to D. except B's portion, which D. subsequently bought at sheriff's sale, where it was sold for B's debt, and C. then made a deed of B's. portion to a stranger for a nominal consideration: *Held*, that such deed was fraudulent as well against D. as against creditors.—Doe Wilcox v. Thorne, 315.

DEMAND FROM DEBTOR ON LIMITS.

1. *Demand for statement of debtor's effects. How to be signed. Service of rule "nisi" for commitment.*] The demand on a debtor on the limits for a statement of his effects, if in writing, must be signed by the plaintiff or his attorney, and the rule nisi for his commitment personally served.—Meighan v. Reynolds, 19.

DEMAND OF POSSESSION.

1. *Ejectment. Tenant impugning landlord's title.*—Where the defendant, who went into possession under the lessor of the plaintiff, afterwards refused to acknowledge his right, — *Held*, that he was entitled to neither a

notice to quit nor a demand of possession.—Doe dem. Bouter v. Frazer et al. 80.

2. *When necessary.*] When the lessor of the plaintiff having been seized in fee of the land in question conveyed it in fee to the defendant, and took back a lease for life at a nominal rent, and the defendant went into possession and so continued for several years with the lessor's knowledge, but without his express consent: *Held*, that he could not be treated as a trespasser and ejected without a demand of possession.—Doe ex dem. Mann v. Keith, 86.

DISTRESS.

1. *After what time illegal.*] A distress made more than six months after the expiration of a tenancy, is illegal; and a continuation of the tenancy will not necessarily be implied from the party's remaining in possession of the premises, without any act to shew the nature of the holding.—Soper v. Brown and Riorden, 103.

DISTRICT COURT.

See "Pleading," 1.

See "Lands," 1.

DOWER.

1. *Plea of non-tenure, how it may be pleaded.*] In dower, a plea of non-tenure is not necessarily a plea in abatement, and it may be pleaded either to part or to the whole of the lands demanded; and where a plea states that the husband devised certain lands to the demandant in bar and satisfaction of dower, and that she agreed to the devise, it is sufficient without setting out the words of the devise; *aliter* where the devise is not in express terms in bar of dower.—Breakenridge v. King, 181.

2. *Service of writ of grand cape.*] In an action of dower *unde nihil habet*, the writ of *grand cape* must be served fifteen days before the return.—*Frazer et al. v. Richardson*, 391.

EASEMENT.

1. *Backing water. License. Case. Covenant.*] Where the plaintiffs, who had built mills on a stream, by indenture granted a license to the defendant to make a race-way over their lands for a mill to be built by the defendant further down the stream, provided that the water was not thrown back thereby nor any injury nor damage occasioned to the plaintiffs' mills; and after the defendant's mill was built, by an accumulation of ice on the by-wash, the water was forced back on the plaintiff's mills: *Held*, that the plaintiffs might maintain an action for such injury, and that case, and not covenant on the indenture, was the proper form of remedy.—*Eastwood and Skinner v. Helliwell*, 38.

EJECTMENT.

See "Notice to Quit," 1, 2; "Demand of Possession," 1, 2.

1. *Mistake in consent rule. Amendment.*] Where the land in question was lot 24, but the land defended in consent rule called lot 23, the Court ordered the consent rule to be amended.—*Doe dem. West v. Howard et al.*, 135.

2. *Staying proceedings in, under 7 Geo. II. ch. 20, sec. 3. Right to add to mortgage debt simple contract debt not in writing.*] Where A. gave an absolute conveyance of land to B. to secure a sum of money lent by

him to A., and B. gave a bond for its reconveyance on the payment of the money lent at a certain day, on ejectment brought by B. after a lapse of eight years, the court ordered that proceedings should be stayed on the payment of principal, interest and costs, and refused to allow the plaintiff to include a simple contract debt incurred on the security of the bond, because there was no writing respecting it, and the stat. 7 Geo. II. ch. 20, under which the proceedings were stayed, did not extend to it.—*Doe ex dem. Shuter Wilkins v. McLean*, 1.

3. *Service of declaration.*] A declaration in ejectment cannot be served by the lessor of the plaintiff.—*Doe Armstrong v. Roe*, 302.

4. *Setting aside judgment in 7 Geo. II. ch. 20.*] The Court will interfere by setting aside a judgment in ejectment, and *hab. fac. poss.* executed upon a mortgage, in favor of an innocent purchaser for valuable consideration without notice, so as to afford him an opportunity of redeeming the mortgage, under the statute 7 Geo. II. ch. 20, on payment of costs.—*Doe Milburne v. Sibbald*, 330.

5. *Setting aside nonsuit in. Mistake of attorney. Conditions.*] The Court set aside nonsuit for not confessing lease, &c., judgment, and *hab. fac. poss.*, on its being shewn on affidavit that defendant's attorney intended to have entered into a special consent rule, but through some inadvertence had omitted to do so, in consequence of which no defence was or could be made, on payment of costs, and on condition that no action should be brought if any entry had been made under the *hab. fac. poss.*—*Doe Lasher v. Edgar*, 339.

ESCAPE.

See "Variance," 1.

What amounts to, and what is evidence of.] Where a sheriff refuses to produce a prisoner in his custody twenty-four hours after notice, it is an escape; and where in debt for an escape on a *capias ad satisfaciendum*, the sheriff pleaded that he gave the prisoner the benefit of the limits, and that he never left them, &c., and the plaintiff replied that he did leave them: *Held*, that the plaintiff shewed an escape under this issue, by proving that after the prisoner was admitted to the limits she was remanded back to custody, that the order remanding her was delivered to the sheriff, and that he received due notice to produce her body, but failed in doing so.—*Wragg v. Jarvis, sheriff*, 317.

ESTOPPEL.

See "Sheriff," 2; "Money paid," 1.

EVIDENCE.

See "Libel and Slander," 1, 2; "Attorney," 1, 4; "Escape," 1.

What sufficient to support verdict. Ejectment.] Where in ejectment notice to produce a crown lease, under which the lessor of the plaintiff had claimed, had been given, and the lease was not produced, but an exemplification was put in, and the defendant gave parol testimony that the lease had been assigned to a third party, who had given a mortgage on it to the lessor, which had been paid at the day, and the jury found for the defendant: *Held*, that the evidence that the lessor had parted with his interest was sufficient to support the verdict.—*Doe Crawford v. Cobbleyke*, 328.

EXECUTION.

See "Sheriff," 3.

EXECUTOR AND ADMINISTRATOR.

See "Money paid," 1.

FIERI FACIAS.

See "Sheriff," 1.

FOREIGN CORPORATION.

Action on notes discounted, and for money had and received.] A foreign corporation—to wit, a bank—cannot maintain an action on promissory notes discounted and received by them in the course of conducting business in this province; although they may maintain an action for money had and received to their use, against the party for whom such promissory note was discounted, and to whom money was advanced upon it.—*Bank of Montreal v. Bethune*, 341.

FRAUDS (STATUTE OF)

See "Money paid," 1.

FRAUDULENT CONVEYANCE.

See "Deed," 4.

GOODS BARGAINED AND SOLD.

Count for, against guarantor of payment of goods to third party.] An action for goods bargained and sold cannot be maintained against a person who has become responsible for the payment of goods delivered to a third party.—*McKenzie et al. v. McBean*, 137.

GOODS SOLD AND DELIVERED.

Liability of owner of vessel to pay for necessities furnished to boat while tortiously

dispossessed of her. Nonsuit.] Where a steamboat was mortgaged and in possession of the mortgagees, who navigated her for their own benefit to secure their advances, and she was tortiously taken possession of by the captain, who received the profits arising from her for his own use: *Held*, that the mortgagor was not liable for goods furnished for the vessel while she was in the tortious possession of the captain.—*Frazer v. Flint*, 12.

GUARANTEE.

See "Goods Bargained and Sold," 1.

INTERLOCUTORY JUDGMENT.

See "Practice," 5.

IRREGULARITY.

See "Attorney," 2.

JOINT STOCK COMPANY.

One member suing another.] A member of a joint stock company not incorporated, lending, with the assent of the company, a sum of money out of the joint stock to another member, and taking from him a promissory note payable to himself individually for repayment, can recover on the note, notwithstanding that the funds were advanced from the common stock.—*Comer v. Thompson*, 256.

JUDGMENT.

See "Lands," 1.

JUDGMENT AS IN CASE OF NONSUIT.

1. *Cause untried for want of time.*] Where a cause was put at the foot of the docket with the consent of the defendant's attorney, and remained untried for

want of time, the Court refused judgment as in case of nonsuit, or the costs of the day to defendant, considering that the plaintiff had been guilty of no laches.—*Bank of Upper Canada v. Covert and Boulton*, 324.

2. *Not granted to one of two defendants.*] Where there are two defendants, judgment as in case of nonsuit, for not going to trial pursuant to notice, will not be granted to one defendant.—*Spafford v. Buchanan and Malloch*, 326.

3. *Cause not tried for want of time.*] Where a cause came on to be tried in its turn, and the plaintiff not being ready, the defendant consented that it should be put at the foot of the docket, and it could not afterwards be tried for want of time, a rule for judgment as in case of nonsuit was refused.—*Bank of Upper Canada v. Bethune et al.*, 330.

4. *Delay occasioned by defendant. Record not entered in proper time. Judgment refused on peremptory undertaking.*] A rule for judgment as in case of nonsuit was discharged on the peremptory undertaking without costs, when, owing to delay occasioned by an application of the defendant, the plaintiff had been prevented from entering his record for trial on the commission day of assizes, and the defendant refused to consent to its being entered afterwards, until the plaintiff's witnesses had gone home, and he knew that the plaintiff could not proceed to trial.—*Penniman v. Wince*, 335.

JUDGMENT OF NON. PROS.

Irregularity in signing.] It is irregular to sign a judgment of non. pros. without filing the

original papers in the judgment office.—Lyman, assignee of Sheriff of Gore District, v. Cotter; Lyman, assignee, &c. v. Lovejoy and Babcock, 15.

JURY.

Special jury, when it may be struck.] A special jury cannot be struck after the commission day of assizes. It is no objection that the sheriff has not summoned all the sixteen jurors, if enough attend to try the cause.

Quære—If a *venire* and *distingas* should not issue for a special jury.—Moovey v. Maynard, 323.

JUSTICE OF THE PEACE.

See "Criminal Information," 1; "Notice of Action," 1.

LACHES.

See "Judgment as in case of Nonsuit," 1.

LANDS.

When bound under 5 Geo. II. ch. 7.] Lands are not bound under the 5 Geo. II. ch. 7, until the delivery of the *fi. fa.* against them to the sheriff. The judgment of a District Court could not bind them for want of a docket.—Doe ex dem. McIntosh v. McDonnell, 195.

LIBEL AND SLANDER.

1. *Declaration. Averment. Evidence.*] Where in case for the slander of the plaintiff's steamboat, it was averred in the declaration that certain persons were going on a voyage in the steamboat, and that the slanderous words were spoken in the hearing of a particular person and others, but no proof was given of the voyage nor of the persons who were going on it, nor of the individual

in whose hearing the words were stated to have been spoken, and the jury found for the plaintiff,—the Court held that the evidence did not support the declaration, and a new trial was granted, without costs.—Hamilton v. Walters, 24.

2. *General issue. Evidence. Privileged communication.*] In case for slander, the defendant may, under the general issue, shew that the words spoken were used in a privileged communication; and where the words imputed slanderous are spoken on an occasion when either from public duty, private interest, or the relation of the parties to each other, the character of the party complaining may be freely discussed, the jury must find express malice upon evidence sufficient to warrant their finding, before the defendant can be pronounced guilty.—Richards v. Boulton, 95.

MANDAMUS.

1. *Clerk of Court of Requests.*] A mandamus was granted against the clerk of a Court of Requests to give up the book and papers of the court, which he had refused to do, on being removed from office.—In re P. P. Lacroix, 339.

2. *To justices of Quarter Session to enter an acquittal.*] Where a person had been convicted before justices of peace and fined, and an appeal to the quarter sessions, the justices there admitted more evidence than had been heard in the conviction, and the accused party was acquitted, but on receiving the opinion of the Attorney General that the additional evidence should not have been admitted, they confirmed the conviction and ordered it to be recorded, but took no notice of the

acquittal, the Court made absolute a rule for a mandamus, commanding them to enter the acquittal.—*Rex v. Justices of Bathurst*, 340.

MESNE PROCESS.

See “Absconding Debtor,” 1;
“Pleading,” 1.

MONEY HAD AND RECEIVED.

By one of two joint assignees of judgment against the other.] Where a judgment was assigned to the defendant for the joint benefit of the plaintiff and himself, and he received the whole amount of it,—*Held*, that the plaintiff could recover his share of it as money had and received.—*Hooker et al. v. McMillan*, 14.

MONEY PAID.

Executors of father against son. Consideration in deed. Statute of Frauds.] Where a father, intending in the distribution of his property to give his son a hundred acres of land, was induced by the son to exchange that land for the property of a stranger, the father paying 125*l.* for such exchange, and the son promising to repay it, so that it might go in the distribution to the rest of the family, and the father then, for a nominal consideration, conveyed to the son the land received in exchange,—*Held*, that the executors of the father might maintain an action against the son for the 125*l.* as money paid to his use; that they were not estopped by the consideration stated in the deed; and that it was not for an interest in lands within the Statute of Frauds.—*McBride et al. v. Parnell*, 152.

NEW TRIAL.

See “Seduction.”

1. *Doubt of jury's correctly finding.*] Where evidence was given to shew that a deed had been procured by fraud, and the jury negatived the fraud, but there seemed great doubt as to the correctness of their finding, a new trial was granted on payment of costs.—*Doe dem. Neilson v. Gilchrist*, 276.

2. *Misapprehension on part of counsel. Rule nisi granted “nunc pro tunc.”*] Where a verdict was given for the plaintiff, and the defendant did not move for a new trial within the four days, owing to misapprehension on the part of his counsel that the plaintiff's counsel was to have disposed of the question of a new trial on the argument of a demurrer in the cause, without any rule, a rule nisi was granted “*nunc pro tunc*.”—*Bank of Montreal v. Bethune*, 303.

3. *Affidavits not sufficiently explicit.*] A new trial on the grounds of discovery of new evidence was refused, the affidavits not being sufficiently explicit, and the Court stating that the defendant could bring an action to recover back possession if his evidence could establish his title.—*Doe Brown v. Fraser*, 371.

NON PROS.

See “Judgment of Non Pros.” 1.

NONSUIT.

See “Mortgagors of Vessels,” 2.
See “Ejectment,” 4.

Nonjoinder of a plaintiff in assumpsit is a ground of nonsuit.—*Walker et al. v. McDonald*, 12.

NOTICE OF ACTION.

Trespass against a magistrate. Judgment by default.] In trespass against a magistrate

for false imprisonment and seizing and selling goods and chattels, where he suffers judgment by default, it is unnecessary for the plaintiff to prove that he gave notice of action or commenced his suit within six months.—*Mills v. Monger*, 383.

NOTICE TO QUIT.

1. *Ejectment. Refusal of tenant to attorn to mortgagee.*] Where in ejectment by a mortgagee, the tenant claimed possession under a lease from the mortgagor, and refused to attorn to the mortgagee (who demanded possession), and shewed no lease nor any certain holding—*Held*, that he was not entitled to notice to quit.—*Doe ex dem. Samson v. Parker*, 36.

2. *Ejectment. Tenant impugning landlord's title.*] Where the defendant, who went into possession under the lessor of the plaintiff, afterwards refused to acknowledge his right,—*Held*, that he was entitled to neither a notice to quit nor a demand of possession.—*Doe ex dem. Bouter v. Frazer et al.*, 80.

NOTICE OF TRIAL.

What sufficient to try the issue and assess the damages.] Where there is an issue in fact and an issue in law, on which contingent damages are to be assessed, a notice of trial was held sufficient to enable the plaintiff to try the issue and assess damages.—*Davis v. Davis*, 322.

PARTNERSHIP.

See "Joint Stock Company."

1. *Action by one partner against another.*] An action cannot be maintained by one partner against another, on an

offer to pay a certain sum, if he would be allowed to keep the books and collect the debts.—*Burgess v. Fanning*, 183.

2. *Note. Private debt.*] A note given by a partner for a private debt in the name of the firm is not binding on the firm.—*Beals v. Sheldon et al.* 302.

PLEADING.

See "Dower," 1; "Arrest of Judgment," 1.

1. *Justification of arrest. Averment.*] In justifying an arrest under mesne process of the District Court, the cause of action should be averred within the jurisdiction, and the writ shewn to be returned.—*Bigcraft v. Clarke*.

2. *Pleas bad on general demurrer.*] Debt on bond against two defendants, conditional that A., as a bank agent, should account as often as he should be called upon—pleas, that before action brought A. ceased to be agent, and that while he was agent he kept all the clauses, &c., in the condition. Secondly, that A. paid the plaintiff's the amount of the penalty in the bond: *Held* bad on general demurrer—the first plea not answering the condition, and the second not being pleaded as accord and satisfaction, nor any release shewn.—*Bank of Upper Canada v. Boulton and Covert*.

3. *Trespass. False Imprisonment. Plea.*] In trespass for false imprisonment, a plea justifying under process of an inferior court, which had been set aside for irregularity on the terms of no action being brought, cannot be sustained.—*Ferris v. Dyer and McDonald*, one, &c. 182.

4. *Debt on bond. Replication shewing no breach. Demurrer.*] Where, in debt on bond

—conditioned that “the defendant, his heirs and assigns, should permit and suffer the plaintiff to cut down, take and carry away all the fire-wood from certain lands, without let, hindrance or molestation” —the defendant pleaded that he was always permitted, and the plaintiff replied that, after the making of the bond, the defendant conveyed the land in fee to a stranger, who would not permit the plaintiff to cut the wood, &c., and the defendant demurred to the replication,—the Court gave judgment for the demurrer, the replication having shewn no breach, the bond being a license under seal, binding on defendant and his vendee, and not revocable by parol, and the plaintiff having shewn no obstruction.—*Fowke v. Fothergill*, 185.

POWER OF COURT OR JUDGE.

See “Costs,” 3.

PRACTICE.

See “Affidavit,” 1; “Ejectment,” 2, 3; “New Trial,” 2; “Judgment of Non Pros.,” 1; “Attorney,” 2; “Judgment as in case of Nonsuit,” 2, 3, 4; “Notice of Trial,” 1; “Notice of Action,” 1.

1. *Amendment of Declaration.* Amended declaration not served. Judgment not signed. *Proceedings set aside.*] Where the plaintiff, after notice of trial given in an action of debt, had leave to amend his declaration in one of the counts, and countermanded his notice, and not having served the amended declaration nor any new demand of plea, signed interlocutory judgment, and afterwards entered final judgment and issued execution,—the proceedings were

set aside for irregularity.—*Randall qui tam v. Taggart*, 2.

2. *Interlocutory judgment set aside, subsequent proceedings irregular.*] Where an interlocutory judgment was set aside by judge’s order, but notwithstanding the order, the plaintiff proceeded and assessed damages, the court set the proceedings aside.—*Staats v. Reynolds*, 5.

3. *Record incomplete. Verdict set aside.*] Verdict set aside, there being several special pleas upon which no issue was raised for want of rejoinders, and there having been no rejoinder served.—*Ferris v. Dyer and McDonell*, 6.

4. *Matters of fact cannot be tried on affidavits.*] The Court will not try matters of fact on affidavits. Where, therefore, the plaintiff moved upon an affidavit of a material fact which was distinctly denied by the defendant, the Court discharged the rule.—*Lemarand v. Whipple*, 12.

5. *Defendant neglects to attend taxation of costs. Costs taxed without disbursements. Defendant refuses costs. Plaintiff obtains verdict. Verdict not set aside.*] Where a new trial was granted on payment of costs by the plaintiff, who served three appointments for the taxation on the defendant, and the costs were at last taxed without disbursements, and the plaintiff tendered the amount, which defendant refused to receive without the disbursements, which the plaintiff would not pay, but proceeded again to trial and obtained a verdict,—the Court refused to set it aside.—*Thompson v. Sewell*, 16.

6. *Security for costs. Affidavits.*] In an affidavit for secu-

rity of costs, it must be stated with certainty that the plaintiff is not resident within the jurisdiction of the court.—Ridden v. Macnab, 136.

7. *Interlocutory judgment.*] An interlocutory judgment, in which the cause is not properly styled, is insufficient to sustain a notice of assessment; and in such a case it is not necessary to give a notice of an intention to move to set aside the proceedings before assessment of damages; but if it be not given, the proceedings will be set aside without costs.—Al-lanson v. Johnson, 323.

QUARTER SESSIONS.

See "Mandamus," 2.

REGISTRY.

See "Deed," 2.

RULES OF COURT.

1st Trinity Term, 3 & 4 Wm. IV., 10.

9th Easter Term, 11 Geo. IV., 321.

SECURITY FOR COSTS.

See "Practice," 6.

SEDUCTION.

New trial refused on affidavits.] The Court refused a new trial in case for seduction, where the jury had found for the defendant on evidence clearly impeaching the character of the seduced, though affidavits were produced on the motion, that the plaintiff, if he had a new trial, would rebut such evidence, and that he would have been prepared to do so at the former trial had he had notice.—Monk v. Casselman, 336.

SHERIFF.

See "Variance," 1; "Escape."

1. *Attachment against, for delay in returning writ.*] Where the rule to return the writ of *fi. fa.* had been taken out and served in June 1833, the Court refused to grant an attachment on the ground of delay.—Loucks v. Farrard, 5.

2. *Trespass. Excessive damages. New trial.*] Where in trespass against a sheriff for seizing the plaintiff's goods, the defence was that they were the goods of a third party, and had been seized as such under an attachment issued against him as an absconding debtor, but had been delivered up at the time of seizure on the plaintiffs' entering into a bond for their production when required, and afterwards they were sold at the suit of the attaching creditor on a writ of *fi. facias*, the plaintiffs having given them up according to the terms of their bond, and the plaintiffs now claimed them as their own property under an assignment from the absconding debtor prior to the attachment, which the defendant contended was fraudulent and void as against creditors, but proved no debt due to the attaching creditor, nor did he shew the judgment nor execution, relying on the bond as estopping the plaintiffs from disputing those facts, and the jury, under the direction of the judge, found for the plaintiffs; the Court, although agreeing in the direction of the judge that the judgment and writ of execution should have been shewn, yet, from the circumstances of the case, and on affidavits filed, shewing that the damages were excessive, granted a new trial on payment of costs.—Powers & Scott v. Ruttan, Sheriff, 58.

3. *Sale by sheriff void—levy being abandoned.*] When per-

sonal property was taken in execution by a sheriff, and afterwards abandoned by the direction of the plaintiff's attorney, and a memorandum of the suit being discharged given to the defendant, but the sheriff was afterwards directed to proceed, and sold to the plaintiff in this action [the property in the meantime having been transferred *bona fide* by the defendant to a third party, who had left it in the possession of the defendant in this action].—*Held*, that no property passed by the sheriff's sale, as the levy had been previously abandoned, and that consequently the plaintiff could not maintain trover.—*Gould v. White*, 124.

4. *Assignment void.* *Sheriff not a trespasser.*] Where A. being indebted to B. and C., and being insolvent, was about to leave the country, but desired to secure to B. the debt he owed him, and instructed his clerk to that effect, who, after his departure, made an assignment of his goods to B. without B.'s knowledge or consent, and before B.'s assent was received the goods were seized by a sheriff under an attachment issued at the suit of C.—*Held*, that the sale to B. was not complete until his assent was received, and that the sheriff having seized the goods before such assent, could not be treated as a trespasser.—*Barrett v. Rapelje*, sheriff, 175.

5. *Wrongful seizure by.* *Right to call in question party's title to property seized.*] A sheriff who has wrongfully seized property in execution, cannot call in question the right of the party from whose possession the property was taken by him, as that it was received under an assignment fraudulent as against creditors,

from the execution debtor.—*Cook v. Jarvis*, sheriff, 250.

SLANDER.

See "Libel and Slander," 1.

STATUTES.

6 Geo. I. ch. 18 [Bubble Act], 165, 193.

7 Geo. II. ch. 20 [Ejectment] 1, 330.

14 Geo. II. ch. 37 [Bubble Act], 165, 193.

2 Geo. IV. ch. 1 [Commission to examine witnesses], 8.

4 Wm. IV. ch. 1, sec. 47 [Real Property], 140.

9 Vic. ch. 34 [Registry Act], 140.

STOCK NOTE.

1. *What "value received" in, imports.*] The words "value received" in a stock note import *prima facie* a consideration; and a consideration which cannot legally be enforced may be sufficient to sustain a promise; and an agreement to pay money on a party's not bidding at a sheriff's sale is not void as being contrary to public policy, when the party making the agreement thereby insured the withdrawal of a claim from the land.—*Waddel v. McCabe*, 191.

2. *Specific demand of work is not necessary.* *Tender of work is.*] Where the defendant purchased land and obtained the same, in payment whereof he gave notes payable in work at fixed prices.—*Held*, that it was incumbent on him to tender the work to the plaintiff, and that an action would be sustained to recover the amount of such notes in money, without proving a specific demand of work, or a refusal by the defendant to perform such work on

demand made.—*Teal v. Clarkson*, 372.

SUBPŒNA.

See "Witness."

TITLE.

See "Damages," 1.

TRESPASS.

1. *Abuse of power given by statute, punishable in.*] Where a statute gave power to certain persons to enter on lands in the neighborhood of a bridge to quarry stone to keep the bridge in repair, &c., doing no unnecessary damage therein,—*Held*, that the power must be strictly pursued, and that any abuse of it by excess was punishable in trespass.—*Myers v. Howard, et al.* 113.

2. *Directions to sheriff by attorney, rendering him liable in.*] Where an attorney directed the sheriff not to give up the goods of A., seized under an attachment as the goods of B,—*Held*, that he became a trespasser by such direction.—*Radenhurst v. McLean and McPherson*, 281.

TROVER.

See "Sheriff," 3.

Breach of agreement. Seizure of property.] Where the plaintiff agreed to build a house for the defendant, who paid a certain sum in advance, and gave the plaintiff permission to make the bricks of which the house was to be built on his land, and to sell any surplus, and the plaintiff not proceeding with the building the defendant seized some bricks which the plaintiff had made and a number of articles belonging to the plaintiff: *Held*, on trover brought by the plaintiff for the value of the bricks and the other articles, that no damages could be

recovered for the seizure of the bricks, as under the agreement they were the property of the defendant; and the jury having estimated their value in the damages, a rule was made absolute to reduce the verdict.—*Wilcox v. Burnside*, 288.

VARIANCE.

See "Amendment," 2.

Alias ca. re. averred in declaration, and ca. re. produced at trial.] In an action of case against a sheriff for not arresting a debtor, and an averment in the declaration of the issuing of an alias writ of *capias ad respondendum*, to support which an original writ of *capias* was produced at the trial, the variance was held immaterial.—*Wood v. Sherwood*, 128.

VERDICT.

Ground for setting aside. Several issues.] Where there are several issues raised, and the plaintiff has a verdict upon the whole record, it forms no good objection to his recovery that some of the issues should have been found for the defendant, if there be sufficient without them to support the verdict and they are not material.—*Howard v. Tyler*, 257.

WATER-COURSE.

See "Easement."

WITNESS.

See "Costs," 4.

Attachment for not attending.] The Court refused an attachment for not attending, against a witness who resided 25 miles from the Court House, and was subpoenaed only the day before trial.—*Fairclaim dem. Thompson v. Putnam*, 336.

308745

Author Upper Canada Reports. King's or Queen's Bench Law
 Title Upper Canada King's Bench reports (Robinson, J. L.) Cu Repts

O.S. 4

DATE.

NAME OF BORROWER.

University of Toronto
 Library

DO NOT
 REMOVE
 THE
 CARD
 FROM
 THIS
 POCKET

Acme Library Card Pocket
 LOWE-MARTIN CO. LIMITED

